LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 3 1966
JOHN F. DAVIS, CLERK

No. 518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend, *Petitioner*,

v.

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

WILLIAM H. ALLEN
BRICE M. CLAGETT
JOHN E. VANDERSTAR
701 Union Trust Building
Washington, D. C. 20005

DONALD R. PAYER
537 Main Street
Ames, Iowa 50010

Attorneys for Petitioner

Of Counsel:

COVINGTON & BURLING
PAYER & VANDERBUR

September 1966

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
Reasons for Granting the Writ	18
Conclusion	35

Appendix A—Constitutional and Statutory Provisions Involved	1a
Appendix B—Opinion of the Supreme Court of Iowa	3a
Appendix C—Opinion of the District Court of Story County, Iowa	14a
Appendix D—Judgment of the Supreme Court of Iowa	22a

INDEX TO CITATIONS

Cases:

Application of Anonymous, 10 Misc. 2d 1076, 170 N.Y.S.2d 178 (1958)	24
Armstrong v. *Manzo*, 380 U.S. 545 (1965)	19, 21
Baram v. *Schwartz*, 151 Conn. 315, 197 A.2d 334 (1964)	27
Bell v. *Leonard*, 251 F.2d 890 (D.C. Cir. 1958)	25
Blow v. *Lottman*, 75 S.D. 127, 59 N.W.2d 825 (1952)	24
Brown v. *Ellison*, 162 So. 2d 805 (La. App. 1964)	24
Browning v. *Humphrey*, 241 N.C. 285, 84 S.E.2d 917 (1954)	24
Commonwealth ex rel. Insalaco v. *Delconte*, 301 Pa. Super. 354, 192 A.2d 750 (1963)	24
Commonwealth ex rel. Shamenek v. *Allen*, 179 Pa. Super. 169, 116 A.2d 336 (1955)	27
Cory v. *Cory*, 70 Cal. App. 2d 563, 161 P.2d 385 (1945)	33
Don v. *Frankel*, 136 Conn. 441, 71 A.2d 713 (1950)	27
Elfbrandt v. *Russell*, 384 U.S. 11 (1966)	33
Ex parte Schultz, 64 Nev. 264, 181 P.2d 585 (1947)	25
Foster v. *Sharpe*, 114 So. 2d 373 (Fla. App. 1959)	27
Giacopelli v. *Florence Crittenton Home*, 16 Ill. 2d 556, 158 N.E.2d 613 (1959)	27
Gibson v. *Dorris*, 386 P.2d 186 (Okla. 1963)	24
Griggs v. *Barnes*, 257 Ala. 21, 57 So.2d 61 (1952)	24

Page

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 20-21, 22
Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888 (1954) .. 26-27
Harrison v. *Harker*, 44 Utah 541, 142 Pac. 716 (1914) 27
Holloway v. *Bradley*, 190 Tenn. 565, 230 S.W.2d 1003 (1950) 25, 27
In re Alsdurf's Petition, 270 Minn. 236, 133 N.W.2d 479 (1965) 24
In re Gary, 112 Ohio App. 331, 167 N.E.2d 509 (1960) 24
In re Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942) 24
In re Kailer, 123 Kan. 229, 255 Pac. 42 (1927) 24
In re M—L—J, 356 S.W.2d 508 (Mo. App. 1962) 24
In re Mathers, 371 Mich. 516, 124 N.W.2d 878 (1963) 24
In re Mrs. M., 74 N.J. Super. 178, 181 A.2d 14 (1962) 25, 27
In re Stuart, 114 F.2d 825 (D.C. Cir. 1940) 24, 25
Jackson v. *Jackson*, 181 Kan. 1, 309 P.2d 705 (1957) 33
Joiner v. *Knieriem*, 243 Iowa 470, 52 N.W.2d 21 (1952) 23
Kent v. *United States*, 383 U.S. 541 (1966) 23
King v. *Shrum*, 244 S.W.2d 720 (Tex. Civ. App. 1951) 27
Kirkum v. *Kasprzak*, 242 Ind. 198, 177 N.E.2d 459 (1961) .. 24
May v. *Anderson*, 345 U.S. 528 (1953) 19, 33
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 19, 20, 22
Meyers v. *Shifrin*, 146 So. 2d 770 (Fla. App. 1962) 24
Morris v. *Jackson*, 66 Wyo. 369, 212 P.2d 78 (1949) 25
McAdams v. *McAdams*, 46 Ill. App. 2d 294, 197 N.E.2d 93 (1964) 27
McClary v. *Follett*, 226 Md. 436, 174 A.2d 66 (1961) 24
McKay v. *Mitzel*, 137 N.W.2d 792 (N.D. 1965) 27
McLendon v. *Pelt*, 208 Ark. 287, 185 S.W.2d 931 (1945) 24
Norval v. *Zinsmaster*, 57 Neb. 158, 77 N.W. 373 (1898) 24
Odell v. *Lutz*, 78 Cal. App. 2d 104, 177 P.2d 628 (1947) 24
Osburn v. *Roberts*, 197 Okla. 206, 169 P.2d 293 (1946) 27
Pendergast v. *Titus*, 95 N.H. 191, 60 A.2d 122 (1948) 25
People ex rel. Buell v. *Bell*, 20 Ill. App. 2d 82, 155 N.E.2d 104 (1959) 24
People ex rel. Portnoy v. *Strasser*, 303 N.Y. 539, 104 N.E.2d 895 (1952) 24
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 19, 20, 22-23
Poe v. *Ullman*, 367 U.S. 497 (1961) 20
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 18, 19, 20, 21
Raymond v. *Cotner*, 175 Neb. 158, 120 N.W.2d 892 (1963) 24
Roche v. *Roche*, 25 Cal. 2d 141, 152 P.2d 999 (1944) 24
Ross v. *Pick*, 199 Md. 341, 86 A.2d 463 (1952) 25
Salvaggio v. *Barnett*, 248 S.W.2d 244 (Tex. Civ. App. 1952), *cert. denied*, 344 U.S. 879 (1953) 33
Schiller v. *Douglas*, 48 Idaho 803, 285 Pac. 1021 (1930) 24
Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) .. 33, 34
Selman v. *Phillips*, 384 U.S. 210 (1966) 19, 21
Sherry v. *Doyle*, 68 Utah 74, 249 Pac. 250 (1926) 24

Page

Simons v. *Smith*, 229 Ore. 277, 366 P.2d 875 (1961) 24
Skeadas v. *Sklaroff*, 84 R.I. 206, 122 A.2d 444 (1956), *cert. denied*, 351 U.S. 988 (1956) 24
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 18
Speiser v. *Randall*, 357 U.S. 513 (1958) 33
Stapleton v. *Poynter*, 111 Ky. 264, 62 S.W. 730 (1901) 24
State ex rel. Day v. *Parker*, 55 N.M. 227, 230 P.2d 252 (1950) .. 25
State ex rel. Guinn v. *Watson*, 210 La. 265, 26 So. 2d 740 (1946) 25
State ex rel. Nelson v. *Whaley*, 246 Minn. 535, 75 N.W.2d 786 (1956) 24
State ex rel. Veach v. *Veach*, 122 Mont. 47, 195 P.2d 697 (1948) 25
Stout v. *Stout*, 166 Kan. 459, 201 P.2d 637 (1949) 24
Stubbs v. *Hammond*, 135 N.W.2d 540 (Iowa 1965) 21
Sweeney v. *Jonesan*, 75 S.D. 213, 63 N.W.2d 249 (1954) 25, 27
Thompson v. *City of Louisville*, 362 U.S. 199 (1960) 34
Torcaso v. *Watkins*, 367 U.S. 488 (1961) 33
Turner v. *Hunter*, 142 Colo. 129, 350 P.2d 202 (1960) 24
Ueckert v. *Ueckert*, 373 S.W.2d 370 (Tex. Civ. App. 1963) ..25, 27
Van Auken v. *Wieman*, 128 Iowa 476, 104 N.W. 464 (1905) .. 23
Walker v. *Williams*, 214 Miss. 34, 58 So. 2d 79 (1952) 25
Watters v. *Watters*, 243 Iowa 741, 53 N.W.2d 162 (1952) 23
Whiteman v. *Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960) 24
Williams v. *Rogers*, 224 S.C. 425, 79 S.E.2d 464 (1954) 25
Wooley v. *Schoop*, 234 Iowa 657, 12 N.W.2d 597 (1944) 23

Constitution and Statutes:

United States Constitution—
First Amendment 2, 3, 21, 33, 34
Third Amendment 21
Fourth Amendment 21
Fifth Amendment 21
Ninth Amendment 21
Fourteenth Amendment 2, 3, 21, 33, 34

Hawaii Sess. Laws, Act 83, § 1(2), at p. 74 (1965) 28
Iowa Code, § 633.559 28-29
Iowa Code, § 668.1-.2 29
28 U.S.C. § 1257(3) 2

Miscellaneous:

ABA Section of Family Law, 1963 Proceedings, p. 38 27-28
Ames Daily Tribune, Feb. 12, 1966 17
Annot., 128 A.L.R. 989 22
McCalls, May 1966, p. 168 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend, *Petitioner,*

v.

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Petitioner prays that a writ of certiorari issue to review a judgment of the Supreme Court of Iowa entered in a habeas corpus proceeding instituted by him on behalf of his son by which judgment the court deprived him of the custody of his son in favor of the child's maternal grandparents.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa (R. 589-600; App. B, pp. 3a-13a, *infra*) is reported at 140 N.W. 2d 152. The opinion of the trial court, the District Court of Story County, Iowa, (R. 572-83; App. C, pp. 14a-21a, *infra*) is not reported.

JURISDICTION

The judgment of the Supreme Court of Iowa (R. 601; App. D, p. 22a, *infra*) was entered on February 8, 1966. A timely-filed petition for rehearing was denied on June 13, 1966. (R. 938). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, consistently with the due process clause of the Fourteenth Amendment and other applicable constitutional provisions, a state may deprive a parent of the custody of his child and award such custody to others when it is conceded that the parent is fit and qualified to act as a parent and has not abandoned or otherwise relinquished custody of his child.

2. If a state in any circumstances may deprive a fit parent who has not abandoned or otherwise relinquished custody of his child of such custody and award such custody to others, whether it may do so, consistently with the due process clause of the Fourteenth Amendment and with the First Amendment, on the ground of the parent's political and religious beliefs and expressions.

3. Whether, consistently with the due process clause of the Fourteenth Amendment, a state may deprive a parent of the custody of his child on the basis of no evidence other than the testimony of a psychologist, retained by the persons contesting custody with the parent, who had never professionally seen the parent or his household and whose opinions stated in his testimony are not those of other psychologists and are contrary to human experience and to common sense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Other constitutional provisions involved and certain Iowa statutes are set out in Appendix A to the petition, pages 1a-2a, *infra*.

STATEMENT

Petitioner, Harold Painter, is the father of an eight-year-old boy named Mark. Mark's mother died in an automobile accident near their home in Pullman, Washington, in December 1962 when Mark was not yet five; Mark's three-year-old sister was also killed. In the emotionally wracking aftermath of the deaths of his wife and daughter Harold Painter returned with his son to California where he, Painter, had grown up. For several months he kept Mark with or near him while he attempted to re-orient his life and at the same time earn a living. However, his working hours were

erratic, there was no woman in the home to look after his son, and arrangements for Mark's care outside the home were not satisfactory.

Therefore, in the summer of 1963 Harold Painter turned to the boy's maternal grandparents, Mr. and Mrs. Dwight M. Bannister, the respondents here. At Painter's request they took Mark from California to their farm home near Ames, Iowa, there to care for him until Painter was in a position where he felt he could attend properly to the rearing of his son.

Harold Painter remarried in November 1964 and with his wife established a new home in Walnut Creek, California. At the end of the 1964-65 school year, during which Mark was in the first grade, Painter and his wife went to Ames to bring Mark back to California with them. The Bannisters refused to let the boy go. The record indicates that at least Mr. Bannister harbored the intention of keeping Mark permanently at the time the grandparents took him to Ames on an ostensibly temporary basis.

Painter then filed a petition for habeas corpus. After a hearing on the petition the trial court awarded custody of Mark to his father. The Bannisters appealed. The Iowa Supreme Court expressly affirmed the trial court's finding that Painter was not unfit and its further finding that the arrangement for the care of Mark by the grandparents was intended to be a temporary one. Despite this the court reversed the judgment of the trial court and awarded custody to the grandparents. The court acted upon its judgment of what would be for Mark's best interests. It concluded that Harold Painter's "way of life"—which it characterized with words like "Bohemian," characterizations based on findings that Painter, *inter alia,* was

"either agnostic or atheist" and a "political liberal"—would not offer as much "stability or security" as the grandparents' household. The court relied heavily upon the testimony of a psychologist retained by the Bannisters who had never seen the Painters or their home but who nevertheless felt able to predict that there was a 90 per cent chance that Mark would "go wrong" if he were moved from the Bannister home to the Painter home.

That, in brief, is the story of this case. Some of the details follow. The facts recited give rise to the questions whether the Iowa Supreme Court has unconstitutionally deprived Harold Painter of the precious right to care for and rear his own son and has unconstitutionally deprived Mark of the equally precious right to be reared by his own father.

Harold Painter is 35 years old. He was born in California and has lived the greater part of his life in San Francisco and the San Francisco Bay Area. His parents were divorced when he was very young, and he was reared by foster parents, Mr. and Mrs. Leo B. McNelly, from the time he was two and one-half. (R. 23, 177, 212). He attended schools in San Francisco. In high school his strong interest and ability in practical subjects led to high grades in shop work, but he flunked out because at that time he was indifferent to academic courses he was required to take. While in school he engaged heavily in sports, and he was active in the Boy Scouts and Sea Scouts from the age of nine. (R. 25-26, 178-79, 209). At seventeen he joined the Navy and served for four years. (R. 25, 28-29, 182). Stationed in Hawaii, he spent his spare time hiking and sailing. He was able to read and to fulfill for the first time a desire to write

that he had had since he was fourteen. He decided to go to college when he left the Navy. (R. 29-30).

Soon after his honorable discharge he entered San Francisco City College, a junior college. He completed the two-year course there, receiving his high school diploma in the meantime, and went on to San Francisco State College, a four-year school. (R. 30-32, 182-83). He had high marks, mostly A's. (R. 31, 33). At each school he was a feature writer for the college newspaper and editor of the college literary magazine, though the magazine at San Francisco State never went into publication because it lacked funds. (R. 33). After more than a year at San Francisco State, he had exhausted the offerings in his English major and had taken some graduate work. He decided that the best thing to do if he was going to be a writer was to get practical experience on a newspaper. (R. 33-34). He left college and went to work for a small paper in the State of Washington. (R. 34-35). A succession of newspaper and other writing jobs followed. (R. 35, 42-44, 46, 62). Increasingly, his aspiration was to become a free-lance writer and photographer. (R. 42, 49, 58-59, 62).

While he was working for the Anchorage, Alaska, Times in 1957, he met Jeanne Bannister, who had come to Anchorage and a job as society editor of the Times from her home in Iowa after graduation from Grinnell College. They were married in April of 1957. (R. 35-37, 478). Jeanne Painter quit her job a month after the marriage. (R. 38). Mark was born on March 4, 1958, in Anchorage. (*Ibid.*)

The family left Alaska in 1959 at a time when Harold Painter was city editor of the Times. (R. 35, 42-43). He worked on newspapers in the State of

Washington and then went to work in July 1960 as editor and art director of the career publications program of Washington State University. (R. 42-46). The Painters lived in Pullman, the seat of the university. (R. 46). Painter left this job, at his employer's request, in August 1962. There were differences of opinion between Painter and his supervisor about matters of style and the like, and Painter thought that an incident involving his defense of the American Civil Liberties Union in a faculty bulletin, which he edited, also contributed to his being asked to leave. (R. 49-50, 343-66; Def. Exs. 35, 36).

Forced at that point to take stock of their lives, Painter and his wife determined that he should apply himself seriously and full-time to his free-lance writing. (R. 50-52, 255-57). To permit him to do this Jeanne Painter took a job with a newspaper in nearby Moscow, Idaho. (R. 48, 51). It was the first time since she quit her job in Anchorage after her marriage that she had worked, otherwise than part-time at home clipping and rewriting local newspaper stories for metropolitan papers. (R. 38, 44, 46-47, 48).

This was the situation when in December 1962 Jeanne Painter and little Janet Painter, who had been born to the couple on June 8, 1959 (R. 42), were killed in an automobile accident. As a result of the tragedy, Painter was, as he testified, "in a state of shock," which "continued in varying degrees for quite a while." (R. 53-54, 188-89). After affairs were attended to in Pullman, Harold Painter returned with Mark to California in February 1963. (R. 57, 59). They stayed for a short time with the McNellys, Harold Painter's foster parents, in Santa Rosa and then moved to nearby Glen Ellyn, where Painter at-

tempted for three months to pursue his free-lance writing and photography. (R. 59-60). Painter had bought a boat; he and Mark went sailing and fishing in San Francisco Bay on weekends. (R. 60-61). In Painter's words, "We felt like we were raw around the edges. Yes, we wanted to relax .... This was a darned good way to have a whale of a good time and forget a few things." (R. 61). Mark, then five, learned to fish and to sail a boat; in time he was able to steer the boat across the Bay. (*Ibid.*)

Painter's free-lancing venture was not successful. In June or July of 1963 he took a full-time job with the Contra Costa Times, a daily newspaper. (R. 62). His assignment entailed a good deal of night work, and he sent Mark to stay with the McNellys. (R. 62-63, 190-91). The conditions in the McNelly household did not prove satisfactory to Painter, however. (R. 65-66). In July 1963, still affected by his wife's death, unable properly to care for Mark himself because of the demands of his job and unwilling to leave the child to a babysitter, he took advantage of an offer to care for Mark that had been made by the Bannisters, his late wife's parents, soon after her death. He testified that he "felt Mark would be better off with the Bannisters because they were educated, sensitive people." He had admired as well as loved one of their four daughters and thought that "if they could have done so much for her, they could probably do as much for Mark." He therefore asked the Bannisters to come and take Mark back to Ames with them. (R. 66-67). It was his clear understanding—and he so explained to Mark—that they would care for Mark temporarily, only until Harold Painter again felt able to care for his son himself. (R. 67-70, 71, 194-95).

Thus, in July 1963, a few months after turning five, Mark went to Ames to stay with his grandparents. In the ensuing months Harold Painter kept in touch with his son by telephone calls and by letters to him and between Painter and the Bannisters. He sent Mark gifts and several poems he wrote especially for his son. (R. 72, 74, 76, 199; Pl. Exs. A, B, C, D; Def. Exs. 15, 21, 22, 26, 27, 28, 31, 32, 33, 34).

Until June 1964 everything proceeded smoothly. Painter's assumption was still that the boy was with the Bannisters temporarily. (R. 76-77). At that time Painter had a disturbing telephone conversation with Dwight Bannister. Painter had become engaged to Marylyn Hansen. In anticipation of his forthcoming marriage he suggested to the Bannisters that it might be appropriate for Mark to return to California before the beginning of the 1964-65 school year. Bannister said that he thought Mark should stay in Iowa and not return to California. (R. 77-80). According to Painter's testimony, Bannister "said the California situation was an unhealthy one and that he had written to my employers and friends, and that they had said derogatory things about me." (R. 80). Painter pressed for an explanation of what Bannister meant, but none was forthcoming. Bannister concluded, ominously, with a suggestion that the matter might be put up to the courts of Iowa to decide. (R. 80, 154).

In September 1964 Painter went to Ames. (R. 82). By this time he had fixed upon November as the date of his wedding, and he was willing that Mark not return home until a convenient breaking point in his school year, either February or June of 1965. (R. 83-84). He presented Bannister with a document to

this effect, which Bannister angrily tore up. (R. 87, 89, 507; Pl. Ex. E).

Painter was married to Marylyn Hansen on November 28, 1964. (R. 150). She is a Phi Beta Kappa graduate of the University of California with a Master's degree from San Francisco State. (R. 151). She had been a recreation worker, both part-time, during college, and full-time. She worked as a playground director in Oakland and had for some years worked for the Red Cross in hospitals in Oakland and in Japan and Korea. (R. 151-52). After she married Harold Painter, she left her job and began preparing their home in Walnut Creek for Mark's return. (R. 91, 152). Painter at that time was working on the copy desk of the Oakland Tribune. (R. 82). (He has since taken a job as a photographer at a Job Corps camp in Pleasanton.)

In February 1965 Painter again raised with the Bannisters the question of Mark's return to his home (Pl. Ex. C), but they were evasive. Yielding to his wife's urging that attempts be made to settle the matter amicably, he did not press the question at that time. (R. 95, 156-57). Then, in June, the Painters went to Ames. On this occasion they were told definitely and flatly by the Bannisters that they would not give Mark up. (R. 96-102). The Painters, having consulted counsel, then went to the school Mark was attending and took steps to take him away. (R. 102-04, 164, 166). When the school authorities intervened and called the Bannisters, the Painters desisted rather than use anything resembling force to assert Painter's unquestionable right to return his son to his home. (R. 104-06, 169).

The present lawsuit followed, initiated by Harold Painter's filing a petition for habeas corpus to reclaim

his own child from the youngster's grandparents. (R. 106, 108).

Evidence received at the hearing on the petition made it clear that the Bannisters were acting in bad faith at least from the time Painter called for their help in a time of need and perhaps from an earlier date. At the time of Jeanne Painter's funeral the Bannisters had urged Painter to let them take care of Mark temporarily (and perhaps to stay with them himself—the accounts of events of that time are not altogether consistent) while he attempted to readjust following his wife's death. (R. 64, 561-62, 571). Bannister harked back to the pioneers, who, he said, made it a custom to "leave their young ones, or even their wives, with the grandparents and for the young men to strike out and make a new home." (R. 64-65, 571). Very soon after that Bannister, for reasons that he claimed did not include laying a basis for challenging Painter's fitness but that he was unable to explain at all satisfactorily, was writing letters to friends and former employers of Painter, asking for information about him. (R. 508, 561). Replies to these letters purportedly were the basis for Bannister's statement in June 1964 that he had received derogatory information about Painter. (R. 80). (In fact, only one such reply appears of record in this case. [Def. Ex. 36].)[1]

[1] The author of that reply, Henry Grosshans, was a witness. (R. 342). He testified that he was University Editor at Washington State University. Harold Painter had worked for him but had been asked to leave. (R. 343-44). Mr. Grosshans' testimony made it clear that the chief reason was the incompatibility of Painter's newspaper background and style with the quite different style called for in university publications. (R. 345-47). Mr. Grosshans testified, in illustrating some of these differences in style, that "this is somewhat idiotic because they are pedantic small points" and "picayunish" and that he was "embarrassed" about raising them. (R. 352-53).

Bannister testified that he had made a decision about Mark while he was in Pullman for Jeanne Painter's funeral. The decision quite clearly was that the only proper home for Mark was with the grandparents. (R. 557-58). Bannister testified that when the grandparents took Mark, ostensibly on a temporary basis, in July 1963, "I would not have been willing to return Mark to him [Painter] at any time he wanted him." (R. 562). The trial court said that "it appears to the Court that the defendants [the Bannisters] had wanted the custody of their grandson, Mark, since the death of their daughter . . . ." (R. 580, p. 19a, *infra*).

Although Mrs. Bannister testified initially that at the confrontation in June 1965 the grandparents were willing to listen to the Painters and decide whether they could conscientiously let Mark go with them, she changed her testimony overnight, and her final sworn statement was that they would not have been willing to let Mark go no matter how much they might have been impressed with Marylyn Painter or by any change they saw in Harold Painter. (R. 508-09, 515-17). They had done nothing to prepare Mark for a return to his father. (R. 499-500). Mrs. Bannister was forthright on this point. "There was no occasion to tell this boy about these [good qualities of his father], and I could not have made such an occasion. I never made any attempt in any way to tell him about his good qualities." (R. 499). Bannister said of Painter, "I can't say that I like this little guy. He is helpless himself. He had defects. If he would give anybody a chance to help him he might not be completely worthless, but as it is now there is no reaching him. We

have no hope." (R. 561).[2] Bannister was distrustful of Painter and kept him under constant surveillance when he was visiting with his son. Painter testified poignantly that he and Mark finally had to climb a

[2] The Bannisters' distorted view of a man whom they barely knew but whom they obviously considered unworthy of their daughter showed up in other ways. They alone testified that Painter's first marriage was not a happy one. (R. 496, 500-02, 560). All the other evidence and the trial court's finding (R. 576, 580, pp. 16a, 19a, *infra*) were to the contrary. (See, *e.g.*, Pl. Ex. F). A social worker, whose information could have come only from the Bannisters, wrote in a report that during the five years of his first marriage Painter "held several different jobs" and "was fired from three of these" and that "for a number of years" Harold Painter free-lanced and made so little money that Jeanne Painter "had to hold a full-time job to support the children adequately." (Ct. Ex. 2). The statements are not true. Painter held four jobs in the period, left two because he was dissatisfied or wanted to try something else, left a third because there was no more job for him, and left the job at Washington State University under circumstances described above. (R. 42-44). Painter free-lanced for a few months, which was the only period of their marriage in which Jeanne Painter worked full-time.

Bannister's description of these events was equally slanted. He said that Painter "decided he wasn't going to do any more work. He was going to do free-lancing. One morning I was with him there and he had a telephone call about a job he was to have taken, but he made a call to the effect that he did not want the job. At the time he was out of work because he had been fired from his job over at Pullman, and this man instead of helping his wife, told his wife to go work for herself, take care of her children, which she did." (R. 559).

Despite the fact that in her will executed in August 1962 Jeanne Painter had said that she had made no specific provision for her children if her husband survived her "as I am confident that he will faithfully provide for their care and I wish him to have unfettered power to do so" (R. 15), the Bannisters persisted in their stated belief that she would have wanted them to take care of Mark in preference to Mark's own father. (R. 511-12).

tree in order to have a few moments alone together during the September 1964 visit to Ames. (R. 85).

All of this appeared of record in the habeas corpus proceeding, but it made up only a small part of that record, most of which was devoted to the issue of the fitness of Harold Painter. His life was examined microscopically. Detectives investigated him. (R. 580, p. 19a, *infra*). A psychiatric examination—which showed him to be normal—was arranged. (R. 113, 496-98; Pl. Ex. M). He and his wife, family, friends and a former employer were questioned at length on the record. (R. 23-375). Much more routinely and briefly, the Bannisters and some persons who had had contact with Mark in Ames also testified. (R. 383, 476, 522, 533, 537, 544, 549, 553, 555). There was lay testimony that, quite naturally, Mark was upset when he came to Ames but had adapted well and, enjoying high basic intelligence, was now a lively, interested, pleasant little boy. (R. 385-86, 397-99, 485-87, 503, 523-25, 532, 533, 537, 544-45, 549).

There was in addition the testimony of Dr. Glenn R. Hawkes, a child phychologist retained by the Bannisters. (R. 403). He testified on the basis of 25 hours of examination of the Bannisters and Mark. (R. 408-09). His examination of Mark included psychological tests and so-called "depth interviews." (R. 409-10). He administered and conducted these without, so far as the record shows, obtaining the consent of the boy's father. He did not see the Painters at all professionally or visit their home, and to him this did not matter. (R. 441, 471). The gist of his testimony was that Mark had established a relationship with the Bannisters and that it would be a bad thing for him to move anywhere at this stage of his life, even if Mark's

father were a "paragon of virtue." (R. 429-34, 441-42, 471). He discounted altogether the importance of the "biological" father, saying that the "psychological premise" on which he operated in this case is that "the biological father is an accident of conception in many cases"—in spite of the fact, which he acknowledged, that Mark had spent most of his life with his "biological" father. (R. 426-27, 442-43, 444). When pressed, Dr. Hawkes even made the astounding prediction that were Mark to be moved—even presumably to a household exactly like that of the Bannisters—there was a 90 per cent chance that he would "go wrong." (R. 445, 448).

Having heard all of this, the trial judge found unhesitatingly that Mark should be returned to his own father. He said that the arrangement by which Mark went to Ames was on "entirely a temporary basis and would continue until the plaintiff [Painter] became settled in his own home with facilities to care for the minor son." He found that Painter was "a proper and fit person to have the care and custody of his own minor son" and that it would be for Mark's best interest "to be reared and educated in his own father's home . . . ." The trial judge found himself unable to accept the testimony of Dr. Hawkes "at full face value because of exaggerated statements and the witness' attitude on the stand." As for Mark, whom he interviewed in private, he found him "a physically well developed boy . . ., considerably above average in mental abilities, pleasant, courteous and well behaved." He had had problems when he first came to Ames but they were "none other than that of a normal child of that age." The judge found it apparent "from the evidence adduced . . . that Mark has many of his

father's characteristics and exhibits a great deal of the good early training given him by his beloved mother." (Pp. 17a-20a, *infra*).

The Bannisters appealed. On appeal the Iowa Supreme Court agreed with the trial court that Painter was fit and had not abandoned or otherwise relinquished his rights to custody of his child—that the arrangement for the care of Mark by his grandparents was intended as a temporary one. Nevertheless the Iowa Supreme Court, though disclaiming the intent to do so, engaged in a comparative evaluation of the Bannister and Painter households and ways of life to arrive at its own judgment of how Mark's best interests would be served. In evaluating Mark's father the court took particular note of the facts that he is an agnostic or atheist who has read some Zen Buddhist literature and that he is a political liberal and sometime defender of the American Civil Liberties Union. It regarded him as "Bohemian" and "romantic," noting that he prefers self-employment to working for a salary, that there are weeds in his front yard, and that he prefers natural wood to paint on his house. The court said the Painter household was "probably intellectually stimulating" but it expressed a strong preference for "security and stability" for a child. The court did not mention—or evaluate on its "security and stability" yardstick—Painter's testimony that the single most important feature of a home where a child is growing up is the love the parents have for the child. (R. 65, 138). It overrode the trial court's healthy skepticism of Dr. Hawkes' bizarre testimony and placed great reliance upon it. On the basis of that testimony and its preference for the "conventional, middle-class, middlewest background" it felt the Ban-

nister household would provide, it awarded custody of Mark to his grandparents. (Pp. 3a-13a, *infra*).

The federal questions presented here were first raised in a petition for rehearing of the Iowa Supreme Court's decision. (R. 602-88). Until that decision the Iowa Supreme Court had never deprived a natural parent, found to be a fit parent who had not abandoned his child, of custody of that child; and certainly not for reasons that included the parent's religious and political beliefs, and on the basis of testimony of a single psychologist whose conclusions are "neither representative nor typical" of child psychologists[3] and are flatly contrary to human experience. The petition also invited to the court's attention the fact that, although the ostensibly good health of the 60-year-old Bannisters was a factor in awarding them custody of Mark, Mr. Bannister retired from his job "for health reasons" four days after the court's decision was announced,[4] having testified six months earlier that it would be ten years before he expected to retire. The petition for rehearing was denied. (R. 938).

---

[3] The quotation appears in a letter from Dr. Paul R. Dingman, Director of the Des Moines Child Guidance Center, commenting upon Dr. Hawkes' testimony and the Iowa Supreme Court's reliance on it. In the letter, which was appended to the petition for rehearing, Dr. Dingman recommended a remand for the taking of additional expert testimony, as did Lawrence H. Scales, Jr., Executive Director of the Iowa Children's Home Society, whose letter was also appended to the petition for rehearing. (R. 678-82).

[4] This information appeared in a newspaper story in the Ames Daily Tribune, Feb. 12, 1966, attached to the petition for rehearing. It is confirmed by another attachment, a letter from Mr. Ned Disque, Associate Director of Information Services at Iowa State University, where Mr. Bannister had been employed. (R. 683-85).

REASONS FOR GRANTING THE WRIT

This case raises important questions as to the extent of a state's power to invade the privacy of a family and destroy a family relationship. If allowed to stand, the decision below would effect a radical change in the relation between the family and the state that would pose a serious threat to the privacy, security and integrity of innumerable families in the United States.

1. (a) The court below has deprived a father, found to be a fit parent and found not to have given up his parental rights, of the custody of his son and has deprived the son of the care and attention of his father because it thinks that it would be in the best interests of the child that others, estranged from the father and many miles from him geographically, should have custody of the child.

The precise question whether a court or any other agency by which state power is exercised may do what the Iowa Supreme Court has done here has never been decided by this Court. Limitations on state power to interfere with family relationships have been prescribed in prior decisions of the Court. They foretell a negative answer to the question. This case presents an ideal opportunity for making explicit what we submit is clear from this Court's prior decisions.

It is a firmly established principle of constitutional law that there is a "private realm of family life which the state cannot enter." *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944). When the states undertake to intervene in family relationships, they trench upon "one of the basic civil rights of man." *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942). Among the constitutionally protected interests within the private realm of family

life is the interest of a parent in having the "care, custody, management and companionship" of his own child and directing the child's upbringing. *May* v. *Anderson,* 345 U.S. 528, 533 (1953); see *Selman* v. *Phillips,* 384 U.S. 210 (1966); *Armstrong* v. *Manzo,* 380 U.S. 545 (1965); *Prince* v. *Massachusetts, supra; Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). Parental rights to the custody, care and companionship of a child are "far more precious . . . than property rights." *May* v. *Anderson, supra.* The correlative right of a child to have the affection, care and attention of his own parent is also worthy of constitutional protection.

Meyer v. *Nebraska, supra,* is the foundation case. There the Court held unconstitutional a state statute forbidding the teaching of languages other than English below the ninth grade. In doing so, the Court stated that the liberty protected by the due process clause of the Fourteenth Amendment

> "denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S. at 399.

Two years later the Court invalidated under the Fourteenth Amendment an Oregon statute requiring all children to attend public schools. *Pierce* v. *Society of Sisters, supra.* In doing so, it emphasized again the fundamental liberty of parents that is beyond the

reach of the state. The Court said that the statute at issue

> "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 534-35.

In *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), the doctrine established by these cases was distilled in the passage from which we have quoted at page 18 above. The Court there, having referred to *Meyer* and *Pierce,* said in fuller context:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Id.* at 166.

The principle of these cases remains vital. That is demonstrated by the Court's opinion and the concurring opinions in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). Each of the opinions written in support of the Court's decision that Connecticut's statutes banning the use of contraceptives were unconstitutional explicitly or by reference cited to *Meyer* and *Pierce.*[5]

---

[5] See the opinion of the Court, 381 U.S. at 482-83; concurring opinion of Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Brennan, *id.* at 488, 495; concurring opinion of Mr. Justice Harlan, *id.* at 500, referring to his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 543-44, 552 (1961); and concurring opinion of Mr. Justice White, 381 U.S. at 502. *Cf.* Poe v. Ullman, *supra,* at 515-18 (Mr. Justice Douglas, dissenting).

Each of the opinions reaffirmed the constitutional sanctity of the family relationship and its guaranteed freedom from unjustifiable state interference. Differences among the opinions concerned the doctrinal basis of that sanctity and guaranteed freedom. Whether the family relationship, and particularly the relationship of parent to child, is protected because it lies "within the zone of privacy created by several fundamental constitutional guarantees"—those of the First, Third, Fourth, Fifth and Ninth Amendments, 381 U.S. at 485; whether it is protected as an aspect of the freedom of association guaranteed by the First Amendment, or whether it is protected as simply within the liberty guaranteed against state incursions by the due process clause of the Fourteenth Amendment,[6] Iowa by its action here has not respected its sanctity.

(b) The states have broad powers to safeguard the welfare of children within their borders. In the exercise of those powers they may sometimes override parental prerogatives, as in the enforcement of child labor laws. See *Prince* v. *Massachusetts,* 321 U.S. 158 (1944). Under juvenile delinquency and juvenile court statutes the states may remove or otherwise protect children from neglectful parents.

There is no legitimate state interest to be served, however, by removing a child from the care of a fit parent who wishes and intends to fulfill and is capable of fulfilling the obligations of parenthood. Thus, in

---

[6] In Armstrong v. Manzo, 380 U.S. 545, 550 (1965), this Court held a father entitled by the due process clause to notice of a proceeding to adopt his son because "the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies." See also Selman v. Phillips, 384 U.S. 210 (1966); Stubbs v. Hammond, 135 N.W. 2d 540, 543 (Iowa 1965).

the case of a dispute over custody between a parent and non-parent a child may be removed from the parent only if the parent is unfit or by agreement or by conduct manifesting abandonment has thrown up his parental rights and obligations.[7] Only then is there the requisite "substantial justification" for entering the constitutionally protected "realm of family life," see *Griswold* v. *Connecticut*, 381 U.S. 479, 502 (1965) (Mr. Justice White, concurring).

Even when dressed up in the legal Latin of *parens patriae* a state's power to protect children does not include a roving commission to determine what custody or guardianship will best serve the interests of every child within its borders. *Cf. Meyer* v. *Nebraska*, 262 U.S. 390, 401-02 (1923). In *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), counsel argued that "as to minors, the state stands in the position of *parens patriae* and may exercise unlimited supervision and control over their contracts, occupation and conduct,

---

[7] This principle is subject to one possible qualification not relevant here. Some courts have not unnaturally tended to regard parental rights as considerably diminished in importance where there has been a divorce and an award of custody to, or assumption of custody by, a parent now deceased, and the surviving parent then attempts to claim custody as against the person who has succeeded to the deceased parent. Even in the case of divorce the general rule is that where custody is awarded to one parent and that parent subsequently dies, the surviving parent will be awarded the custody unless unfit. See Annot., 128 A.L.R. 989. The constitutional basis for such a rule in cases involving divorce may be substantially less compelling, however, because of the voluntary relinquishment by the parents of the family's claims to privacy and continued existence as a legally protected entity. In the present case, of course, the surviving parent disputing custody with others has not himself participated in the dissolution of his family by giving grounds for or suing for divorce.

and the liberty and right of those who assume to deal with them." *Id.* at 512. The Court rejected this argument.[8]

In this case there was no such unfitness of a parent or abandonment of a child by a parent as might justify an award of custody to others. The Iowa Supreme Court found specifically that it was "not confronted with a situation where one of the contesting parties is not a fit or proper person." It found that "there is no suggestion in the record that Mr. Painter is morally unfit," and, speaking of Painter, it said that "an individual is free to choose his own values, within bounds, which are not exceeded here." Finally, it found "no merit in the Bannister claim that Mr. Painter permanently relinquished custody. It was intended to be a temporary arrangement." (Pp. 5a, 8a, *infra*). Under Iowa law as it stood prior to the decision in this case such findings would have led inevitably to an award of custody to the natural parent.[9]

The prior law of Iowa accords with the law generally applied in most of the jurisdictions of the United

---

[8] This Court recently pointed out that "the admonition to function in a 'parental' relationship" contained in a juvenile court act that makes the state "*parens patriae* rather than prosecuting attorney and judge" "is not an invitation to procedural arbitrariness." Kent v. United States, 383 U.S. 541, 555 (1966).

[9] Watters v. Watters, 243 Iowa 741, 744, 53 N.W.2d 162, 163 (1952); Joiner v. Knieriem, 243 Iowa 470, 479, 52 N.W.2d 21, 26 (1952); Wooley v. Schoop, 234 Iowa 657, 660, 12 N.W.2d 597, 599 (1944); Van Auken v. Wieman, 128 Iowa 476, 104 N.W. 464 (1905).

States.[10] In some of these the constitutional dimensions of the rule that a fit parent who has not abandoned his child is entitled to the custody of the child as against strangers have been explicitly recognized. Among these states are California, Minnesota, Nebraska, New York and Rhode Island.[11] The Court of Appeals for the District of Columbia Circuit has declared:

---

[10] See, *e.g.*, Griggs v. Barnes, 257 Ala. 21, 57 So. 2d 61 (1952); McLendon v. Pelt, 208 Ark. 287, 185 S.W.2d 931 (1945); Roche v. Roche, 25 Cal. 2d 141, 152 P.2d 999 (1944); Turner v. Hunter, 142 Colo. 129, 350 P.2d 202 (1960); In re Stuart, 114 F.2d 825 (D.C. Cir. 1940); Meyers v. Shifrin, 146 So. 2d 770 (Fla. App. 1962); Schiller v. Douglas, 48 Idaho 803, 285 Pac. 1021 (1930); People ex rel. Buell v. Bell, 20 Ill. App. 2d 82, 155 N.E.2d 104 (1959); Kirkum v. Kasprzak, 242 Ind. 198, 177 N.E.2d 459 (1961); Stout v. Stout, 166 Kan. 459, 201 P.2d 637 (1949); In re Kailer, 123 Kan. 229, 255 Pac. 42 (1927); Stapleton v. Poynter, 111 Ky. 264, 62 S.W. 730 (1901); Brown v. Ellison, 162 So. 2d 805 (La. App. 1964); McClary v. Follett, 226 Md. 436, 174 A.2d 66 (1961); In re Mathers, 371 Mich. 516, 529, 124 N.W.2d 878, 884 (1963); In re Alsdurf's Petition, 270 Minn. 236, 133 N.W.2d 479 (1965); In re M—L—J, 356 S.W.2d 508 (Mo. App. 1962); Raymond v. Cotner, 175 Neb. 158, 120 N.W.2d 892 (1963); Application of Anonymous, 10 Misc. 2d 1076, 170 N.Y.S.2d 178 (1958); Browning v. Humphrey, 241 N.C. 285, 84 S.E.2d 917 (1954); In re Gary, 112 Ohio App. 331, 167 N.E.2d 509 (1960); Gibson v. Dorris, 386 P.2d 186 (Okla. 1963); Simons v. Smith, 229 Ore. 277, 283, 366 P.2d 875, 878 (1961); Commonwealth ex rel. Insalaco v. Deleonte, 301 Pa. Super. 354, 192 A.2d 750 (1963); Skeadas v. Sklaroff, 84 R.I. 206, 122 A.2d 444 (1956), *cert. denied*, 351 U.S. 988 (1956); Blow v. Lottman, 75 S.D. 127, 59 N.W.2d 825 (1952); Sherry v. Doyle, 68 Utah 74, 82, 249 Pac. 250, 253 (1926); In re Hudson, 13 Wash. 2d 673, 693-95, 126 P.2d 765, 775 (1942); Whiteman v. Robinson, 145 W. Va. 685, 694-95, 116 S.E.2d 691, 696 (1960).

[11] See Odell v. Lutz, 78 Cal. App. 2d 104, 106, 177 P.2d 628, 629 (1947); State ex rel. Nelson v. Whaley, 246 Minn. 535, 547, 75 N.W.2d 786, 794 (1956); Norval v. Zinsmaster, 57 Neb. 158, 161-62, 77 N.W. 373, 374 (1898); People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952); Skeadas v. Sklaroff, 84 R.I. 206, 210, 122 A.2d 444, 446 (1956), *cert. denied*, 351 U.S. 988 (1956).

"Under our constitutional system, the citizen has more than a revocable privilege to possess and to rear his children. Under our theory of government there is recognized as inherent in parents a right to maintain the custody and to direct the upbringing and education of their own offspring. True, this right is not absolute. If parents treat their children with cruelty or neglect, or are unfit in character or mode of life suitably to control their associations and upbringing, the state for the welfare of the child and society may interfere. But rights guaranteed by the constitution are not to be qualified either by legislation or judicial action having no reasonable relation to some purpose within the competency of the state. In respect of the liberty of parents to direct the upbringing and education of their children see Pierce v. Society of Sisters . . . ." *In re Stuart*, 114 F. 2d 825, 832 (D.C. Cir. 1940).[12]

(c) In some states confusion has been introduced into cases in which a parent contests custody with a non-parent by uncritical judicial use of the broad statement that in custody disputes the governing consideration is the best interests of the child.[13] Even in

[12] See also Bell v. Leonard, 251 F.2d 890 (D.C. Cir. 1958).

[13] State ex rel. Guinn v. Watson, 210 La. 265, 270, 26 So. 2d 740, 742 (1946); Ross v. Pick, 199 Md. 341, 350, 86 A.2d 463, 468 (1952); Walker v. Williams, 214 Miss. 34, 42, 58 So. 2d 79, 81 (1952); State ex rel. Veach v. Veach, 122 Mont. 47, 52-53, 195 P.2d 697, 700 (1948); Ex parte Schultz, 64 Nev. 264, 268-69, 181 P.2d 585, 587 (1947); Pendergast v. Titus, 95 N.H. 191, 192, 60 A.2d 122, 123 (1948); In re Mrs. M., 74 N.J. Super. 178, 186, 187, 181 A.2d 14, 18 (1962); State ex rel. Day v. Parker, 55 N.M. 227, 230, 230 P.2d 252, 254 (1950); Williams v. Rogers, 224 S.C. 425, 428, 79 S.E.2d 464, 465 (1954); Sweeney v. Joneson, 75 S.D. 213, 216, 63 N.W.2d 249, 251 (1954); Holloway v. Bradley, 190 Tenn. 565, 571, 230 S.W.2d 1003, 1006 (1950); Ueckert v. Ueckert, 373 S.W.2d 370, 372-73 (Tex. Civ. App. 1963); Morris v. Jackson, 66 Wyo. 369, 379-80, 212 P.2d 78, 82 (1949).

these states the result of the cases, as opposed to the language used, is very seldom the destruction of a natural parent-child relationship in the absence of unfitness or abandonment.

The best-interests test is properly invoked in those unhappy cases where two parents, divorcing or separating, are contesting for the custody of their child or where an orphan or abandoned child is the subject of a custody dispute between two persons neither of whom is his parent. In such cases a comparative examination of what the contending parties have to offer the child and what result will be in the child's best interests is the only rational method of decision.

There is no occasion for such an examination in the case of a dispute between a parent and a stranger, once the parent is found fit and found not to have abandoned his child. This is simply a matter of allocation of the power of decision. Under our system decisions as to what will best serve the interests of children are generally made by fit parents, not by the state. Mr. Justice (now Chief Justice) Traynor of the California Supreme Court has explained the point aptly. He said that "the rule requiring that custody be awarded to [a fit] parent in preference to a stranger does not operate to subordinate the interests of the child to those of the parent; it merely serves to define the area of the parent's responsibility for the welfare of the child." For "if a parent is fit he will be vitally concerned with the best interests of the child. By leaving to him the responsibility as to how those interests will be best served the court simply recognizes that 'it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state

can neither supply nor hinder . . . .'" *Guardianship of Smith,* 42 Cal. 2d 91, 97, 265 P. 2d 888, 891-92 (1954) (concurring). Even among courts that profess to use the best-interests test in all custody cases, the results in all but a handful of cases are consistent with this view.[14]

Dicta are frequent suggesting that even in a parent-stranger case the best-interests test demands a comparative evaluation of those disputing custody, however, and occasionally a court has been so bemused by them that it has denied a fit parent's claim to custody of a child that he had not abandoned to a stranger.[15] The dicta have, moreover, led the Section of Family Law of the American Bar Association to propose a model custody statute that in relevant part would read as follows:

> "Custody may be awarded to persons other than the father or mother whenever such award serves the best interests of the child. Any person who

---

[14] See Foster v. Sharpe, 114 So. 2d 373 (Fla. App. 1959); In re Mrs. M., 74 N.J. Super. 178, 181 A.2d 14 (1962); Sweeney v. Jonson, 75 S.D. 213, 63 N.W.2d 249 (1954); Holloway v. Bradley, 190 Tenn. 565, 230 S.W.2d 1003 (1950); Ueckert v. Ueckert, 373 S.W.2d 370 (Tex. Civ. App. 1963); Harrison v. Harker, 44 Utah 541, 142 Pac. 716 (1914). For a case in which a parent whom the record showed clearly to be unfit was denied custody professedly on the basis of the best-interests test, see Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 556, 158 N.E.2d 613 (1959); compare McAdams v. McAdams, 46 Ill. App. 2d 294, 197 N.E.2d 93 (1964).

[15] See Don v. Frankel, 136 Conn. 441, 71 A.2d 713 (1950); Osburn v. Roberts, 197 Okla. 206, 169 P.2d 293 (1946) (compare Gibson v. Dorris, 386 P.2d 186 [Okla. 1963]); Commonwealth ex rel. Shamenek v. Allen, 179 Pa. Super. 169, 116 A.2d 336 (1955). See also Baram v. Schwartz, 151 Conn. 315, 197 A.2d 334 (1964) (prior dissolution of family by divorce); McKay v. Mitzel, 137 N.W.2d 792 (N.D. 1965) (same); King v. Shrum, 244 S.W.2d 720 (Tex. Civ. App. 1951) (same); see note 7, *supra.*

> has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody."[16]

The statute, which we submit is plainly unconstitutional in some of its apparent applications, has already been adopted by one state, Hawaii.[17] The thinking reflected by it and by the decision below carries a grave enough threat to the constitutionally protected sanctity of family relationships that this Court should take this matter in hand at this time.

(d) The dangers of engaging in a comparative evaluation of what the parties to a custody dispute between a parent and strangers have to offer the child are well illustrated by the facts of this case. Once a judge or anyone else considers himself free to decide where a child will be "best off," the temptation is overwhelming for him to favor the environment that he personally finds most congenial or that most resembles his own. The court below in effect established itself as the supreme guardian of the children within its jurisdiction, deciding on the basis of its own tastes, preferences and values which of them should be raised by their own admittedly fit parents and which by others thought better suited to direct their upbringing.[18]

The court proceeded from a statute providing that "the parents of a minor, or either of them, if qualified

---

[16] ABA Section of Family Law, 1963 Proceedings, p. 38.

[17] Hawaii Sess. Laws, Act 83, § 1(2), at p. 74 (1965).

[18] "We are here setting the course for Mark Wendell Painter's future. . . . Legal training and experience are of little practical help in solving the complex problems of human relations." (P. 3a, *infra*).

and suitable, shall be preferred over all others for appointment as guardian."[19] The court referred to this as "the presumption of parental preference, which though weakened in the past several years, exists by statute." (P. 8a, *infra*). Although disregard by the court of a rule prescribed by its own legislature does not present a federal question, the arrogation of power by the court is instructive as to its attitude.

In making its determination of where the best interests of Mark Painter lay, the court below thought it relevant that Harold Painter preferred the challenge of self-employment to working for others for a salary; that, like many other married men, he has looked to his wife to handle the family finances; that there are weeds in his front yard and he likes his house as it is, unpainted; that his feeling for his first wife led him to hold a private funeral service, attended only by himself, and that he attended her public funeral dressed in a sport shirt and sweater. On the basis of these and other considerations that are treated in the next section of the petition the court reached its conclusion that in the Painter household Mark would be exposed to a life that was "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating." By contrast, the Bannister home was described as providing Mark "with a stable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it." (Pp. 5a-8a, *infra*).

The fact that the court considered matters such as these, matters of attitude and of personal taste, as even

---

[19] Iowa Code § 633.559, successor to Iowa Code §§ 668.1-.2. (Pp. 1a-2a, *infra*).

worthy of mention demonstrates the intense danger of a rule that allows an arm of the state to intrude its own beliefs and values into a custody contest between a parent and a non-parent. The court, it is true, entered a disclaimer in this regard. It said that "it is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so." (P. 5a, *infra*). But the action it took is inconsistent with the disclaimer it made. The court professed to be deciding what was best for Mark specifically, but there is nothing in the record to indicate that Mark had any special needs that would be met better by the idealized Bannister home that the court constructed than by the Painter household it saw depicted in the record. The court said that "were the question simply which household would be the most suitable in which to raise a child, we would have unhesitatingly chosen the Bannister home. We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child." (P. 8a, *infra*). Not *this* child, note; but *any* child.

The court purported to find a basis for a conclusion that Mark particularly needed the stability of the Bannister household rather than the intellectual stimulation of the Painter household in the testimony of Dr. Hawkes, the psychologist who testified for the Bannisters. But Dr. Hawkes' testimony was that Mark needed a "stable," that is, unchanging, "father figure," not that he had a particular need for domestic "stability" of the kind that the court believed to characterize the Bannister household and not the Painter household. (R. 429-32, 441-43, 471-72). Two entirely different kinds of "stability" are involved and were

confused by the court in its opinion. Thus no support can be derived from Dr. Hawkes' testimony for the court's excursion into an intensely dangerous, and constitutionally prohibited, qualitative assessment of two different ways of life.

Moreover, in the court's rosy view of the Bannisters and their home it ignored factors that cast doubt upon their fitness to direct Mark Painter's upbringing. In disregarding these factors, it disserved children in whose best interests it would be to be placed temporarily in an Iowa home because of exigencies of their parents' situation. The court found that "there is no merit in the Bannister claim that Mr. Painter permanently relinquished custody. It was intended to be a temporary arrangement." (P. 8a, *infra*). On this finding the Bannisters were guilty of a gross breach of faith in refusing to return Mark to his father.[20] The court went on to say that "a father should be encouraged to look for help with the children from those who love them without the risk of thereby losing the custody of the children permanently." (*Ibid.*) But its decision belies the concern thus expressed. A widower who is, for example, called into the service will think long before doing what may be the best thing for his child by leaving him with relatives if he knows that those relatives may thwart his effort to resume his full parental privileges and obligations at some future date by persuading a judge or some other official that the child will be better off staying with them.

---

[20] This is to say nothing of the trial court's belief, based upon the record, that from the time their daughter died the Bannisters wanted to keep Mark permanently. See p. 12, *supra*.

The court also disregarded the Bannisters' failure to foster in Mark the feeling for his father that any little boy should have. (See pp. 12-13, *supra*). It is unnatural enough that a child, found as Mark was by the trial court here to have "many of his father's characteristics" and who, as even the Iowa Supreme Court thought, "should be encouraged in every way possible to know his father," should be deprived of the care and attention of his father in the father's own home. It is even more unnatural that he should be left with persons who it is fair to infer will attempt to alienate him from his father.

2. The court below said that its "conclusion as to the type of home Mr. Painter would offer is based upon his Bohemian approach to finances and life in general," and that "we feel there is much evidence which supports this conclusion." Among the items of evidence that the court then proceeded to recite, in addition to those we have discussed above, were the facts that

> "Mr. Painter is either an agnostic or atheist and has no concern for formal religious training. He has read a lot of Zen Buddhism and 'has been very much influenced by it'. Mrs. Painter is Roman Catholic. They plan to send Mark to a Congregational Church near the Catholic Church, on an irregular schedule.
>
> "He is a political liberal and got into difficulty in a job at the University of Washington for his support of the activities of the American Civil Liberties Union in the university news bulletin." (P. 7a, *infra*).

If there is ever any room for a court or other organ of the state to deprive a fit parent of the custody of

his child, which we deny, it clearly cannot base such a deprivation in whole or in part upon the parent's political opinions and religious beliefs and expressions.

The First Amendment as made applicable to the states by the Fourteenth prevents a state from withholding a notary public's appointment because of an applicant's unwillingness to take a religious oath, *Torcaso* v. *Watkins,* 367 U.S. 488 (1961); and from withholding a tax exemption, *Speiser* v. *Randall,* 357 U.S. 513, 518-19 (1958); denying admission to the bar, *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957); or denying public employment, *Elfbrandt* v. *Russell,* 384 U.S. 11, 18 (1966), because of political beliefs or associations. *A fortiori,* a parent's right to custody of his child, "a personal right entitled to . . . protection," *May* v. *Anderson,* 345 U.S. 528, 534 (1953), cannot be denied because of the parent's religious beliefs or political views. State courts have recognized that custody awards cannot constitutionally be based upon the religious beliefs of one of the litigants. *Cory* v. *Cory,* 70 Cal. App. 2d 563, 568-74, 161 P. 2d 385, 389-92 (1945); *Jackson* v. *Jackson,* 181 Kan. 1, 9-10, 309 P. 2d 705, 711-12 (1957); *Salvaggio* v. *Barnett,* 248 S.W. 2d 244 (Tex. Civ. App. 1952), *cert. denied,* 344 U.S. 879 (1953).

The judgment is not saved by the court's statement that the facts it recited, including the facts concerning Painter's political views and religious beliefs, "are not related as a criticism of Mr. Painter's conduct, way of life or sense of values." Criticism or not, the considerations entered into the court's assessment of the Painter way of life, to which the court found the Bannister way of life preferable, and thus into the court's ultimate decision that custody of Mark should be

awarded to his grandparents. Such a decision is unconstitutional under the First and Fourteenth Amendments.

Nor is the decision below saved from this constitutional infirmity by the fact that the court placed "a great deal of reliance on the testimony of Dr. Hawkes," the psychologist retained by the Bannisters. The court was not willing to accept as an exclusive, independent ground of decision Dr. Hawkes' opinion, given without any professional examination of the Painters or their household, that it would be bad for Mark to be moved. After discussing the psychologist's testimony the court declared that "we know more of Mr. Painter's way of life than Dr. Hawkes," and that it had concluded, on the basis of all the considerations we have heretofore discussed, "that it [Mr. Painter's way of life] does not offer as great a stability or security as the Bannister home."

3. In any event, were the Hawkes testimony to be regarded as an exclusive, independent ground of decision, the decision of the court below would be unconstitutional, in violation of the Fourteenth Amendment, as resting in substance on no evidence at all. See *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957). For Dr. Hawkes' opinions that the biological parent of a child is of no importance, that it is irrelevant even to consider where a child may be moved in judging whether he should be moved, and that a child of Mark's age and history of adaptation to change has a 90 per cent chance of "going wrong" if his custody is changed, even by being restored to his natural parent with whom he has lived for most of his life, are so far contrary to human experience that they

must be discredited. They do not represent the opinion of the psychological profession generally or of others expert in matters of child care, as was demonstrated by us in our petition for rehearing below. Dr. Paul R. Dingman, Director of the Des Moines Child Guidance Center, stated after having read Dr. Hawkes' testimony that "other competent psychologists would have reason to disagree with the procedures, with the findings, and with the conclusions of Dr. Hawkes." (R. 679).[21] It would clearly be a denial of due process to rest a decision on testimony based upon those procedures and embodying those findings and conclusions.

CONCLUSION

The writ of certiorari should be issued.

Respectfully submitted,

WILLIAM H. ALLEN
BRICE M. CLAGETT
JOHN E. VANDERSTAR
701 Union Trust Building
Washington, D. C. 20005

DONALD R. PAYER
537 Main Street
Ames, Iowa 50010

Attorneys for Petitioner

Of Counsel:

COVINGTON & BURLING
PAYER & VANDERBUR

September 1966

[21] Dr. Benjamin Spock, the renowned pediatrician, is quoted as believing that "the whole line of Dr. Hawkes' reasoning was 'preposterous, ridiculous.'" McCalls, May 1966, p. 168.

APPENDIX A

The Third Amendment to the United States Constitution provides:

> "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "[No person] shall be compelled in any criminal case to be a witness against himself. . . ."

The Ninth Amendment to the United States Constitution provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Section 559 of the Iowa Probate Code, Iowa Code § 633.559, enacted in 1963, provides in pertinent part:

> "The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian. . . ."

Former Section 668.1 of the Iowa Code, repealed at the same time that § 633.559 was enacted, provided:

"Parents are the natural guardians of the persons of their minor children, and equally entitled to their care and custody."

Former Section 668.2 of the Iowa Code, also repealed at the time that Section 633.559 was enacted, provided:

"The surviving parent becomes such guardian, but if there is none, the district court shall appoint one, who shall have the same power and control over his ward as the parents would have, if living."

Rule 344(f)(15) of the Iowa Rules of Civil Procedure, promulgated by the Iowa Supreme Court, and dealing with the content of briefs in that court, provides:

"(f) The following propositions are deemed so well established that authorities need not be cited in support of any of them:

* * *

"(15) In child custody cases the first and governing consideration of the courts must be the best interest of the child.

Section 684.18 of the Iowa Code provides:

"The supreme court shall have the power to prescribe all rules of pleading, practice and procedure, and the forms of process, writs and notices, for all proceedings of a civil nature in all courts of this state, for the purpose of simplifying the same, and of promoting the speedy determination of litigation upon its merits. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

APPENDIX B

IN THE SUPREME COURT OF IOWA

251

51974

MARK WENDELL PAINTER, a Minor,
by HAROLD W. PAINTER, his Father and Next Friend,
Appellee,

v.

DWIGHT BANNISTER and MARGARET BANNISTER,
Husband and Wife,
Appellants.

Appeal from Story District Court—Ed J. Kelley, Judge.

* * *

STUART, J.

We are here setting the course for Mark Wendell Painter's future. Our decision on the custody of this 7 year old boy will have a marked influence on his whole life. The fact that we are called upon many times a year to determine custody matters does not make the exercising of this awesome responsibility any less difficult. Legal training and experience are of little practical help in solving the complex problems of human relations. However, these problems do arise and under our system of government, the burden of rendering a final decision rests upon us. It is frustrating to know we can only resolve, not solve, these unfortunate situations.

The custody dispute before us in this habeas corpus action is between the father, Harold Painter, and the maternal grandparents, Dwight and Margaret Bannister. Mark's mother and younger sister were killed in an auto-

mobile accident on December 6, 1962 near Pullman, Washington. The father, after other arrangements for Mark's care had proved unsatisfactory, asked the Bannisters, to take care of Mark. They went to California and brought Mark to their farm home near Ames in July, 1963. Mr. Painter remarried in November, 1964 and about that time indicated he wanted to take Mark back. The Bannisters refused to let him leave and this action was filed in June, 1965. Since July 1965 he has continued to remain in the Bannister home under an order of this court staying execution of the judgment of the trial court awarding custody to the father until the matter could be determined on appeal. For reasons hereinafter stated, we conclude Mark's better interests will be served if he remains with the Bannisters.

Mark's parents came from highly contrasting backgrounds. His mother was born, raised and educated in rural Iowa. Her parents are college graduates. Her father is agricultural information editor for the Iowa State University Extension Service. The Bannister home is in the Gilbert Community and is well kept, roomy and comfortable. The Bannisters are highly respected members of the community. Mr. Bannister has served on the school board and regularly teaches a Sunday school class at the Gilbert Congregational Church. Mark's mother graduated from Grinnell College. She then went to work for a newspaper in Anchorage, Alaska, where she met Harold Painter.

Mark's father was born in California. When he was 2½ years old, his parents were divorced and he was placed in a foster home. Although he has kept in contact with his natural parents, he considers his foster parents, the McNelly's as his family. He flunked out of a high school and a trade school because of a lack of interest in academic subjects, rather than any lack of ability. He joined the navy at 17. He did not like it. After receiving an honorable discharge, he took examinations and obtained his high school diploma. He lived with the McNelly's and went to college for 2½ years under the G.I. bill. He quit college to take a job on a small newspaper in Ephrata, Washington in

November 1955. In May 1956, he went to work for the newspaper in Anchorage which employed Jeanne Bannister.

Harold and Jeanne were married in April, 1957. Although there is a conflict in the evidence on the point, we are convinced the marriage, overall, was a happy one, with many ups and downs as could be expected in the uniting of two such opposites.

We are not confronted with a situation where one of the contesting parties is not a fit or proper person. There is no criticism of either the Bannisters or their home. There is no suggestion in the record that Mr. Painter is morally unfit. It is obvious the Bannisters did not approve of their daughter's marriage to Harold Painter and do not want their grandchild raised under his guidance. The philosophies of life are entirely different. As stated by the psychiatrist who examined Mr. Painter at the request of Bannisters' attorneys: "It is evident that there exists a large difference in ways of life and value systems between the Bannisters and Mr. Painter, but in this case, there is no evidence that psychiatric instability is involved. Rather, these divergent life patterns seem to represent alternative normal adaptations."

It is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so. However, the philosphies are important as they relate to Mark and his particular needs.

The Bannister home provides Mark with a stable, dependable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it. It provides a solid foundation and secure atmosphere. In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable.

Little additional recitation of evidence is necessary to support our evaluation of the Bannister home. It might be

pointed out, however, that Jeanne's three sisters also received college educations and seem to be happily married to college graduates.

Our conclusion as to the type of home Mr. Painter would offer is based upon his Bohemian approach to finances and life in general. We feel there is much evidence which supports this conclusion. His main ambition is to be a free lance writer and photographer. He has had some articles and picture stories published, but the income from these efforts has been negligible. At the time of the accident, Jeanne was willingly working to support the family so Harold could devote more time to his writing and photography. In the 10 years since he left college, he has changed jobs seven times. He was asked to leave two of them; two he quit because he didn't like the work; two because he wanted to devote more time to writing and the rest for better pay. He was contemplating a move to Berkeley at the time of trial. His attitude toward his career is typified by his own comments concerning a job offer:

"About the Portland news job, I hope you understand when I say it took guts not to take it; I had to get behind myself and push. It was very, very tempting to accept a good salary and settle down to a steady, easy routine. As I approached Portland, with the intention of taking the job, I began to ask what, in the long run, would be the good of this job: 1, it was not *really* what I wanted; 2, Portland is just another big farm town, with none of the stimulation it takes to get my mind sparking. Anyway, I decided Mark and myself would be better off if I went ahead with what I've started and the hell with the rest, sink, swim or starve."

There is general agreement that Mr. Painter needs help with his finances. Both Jeanne and Marilyn, his present wife, handled most of them. Purchases and sales of books, boats, photographic equipment and houses indicate poor financial judgment and an easy come easy go attitude. He dissipated his wife's estate of about $4300, most of which was a gift from her parents and which she had hoped would be used for the children's education.

The psychiatrist classifies him as "a romantic and somewhat of a dreamer". An apt example are the plans he related for himself and Mark in February 1963: "My thought now is to settle Mark and myself in Sausilito, near San Francisco; this is a retreat for wealthy artists, writers, and such aspiring artists and writers as can fork up the rent money. My plan is to do expensive portraits ($150 and up), sell prints ($15 and up) to the tourists who flock in from all over the world * * *."

The house in which Mr. Painter and his present wife live, compared with the well kept Bannister home, exemplifies the contrasting ways of life. In his words "it is a very old and beat up and lovely home * * *". They live in the rear part. The interior is inexpensively but tastefully decorated. The large yard on a hill in the business district of Walnut Creek, California, is of uncut weeds and wild oats. The house "is not painted on the outside because I do not want it painted. I am very fond of the wood on the outside of the house."

The present Mrs. Painter has her master's degree in cinema design and apparently likes and has had considerable contact with children. She is anxious to have Mark in her home. Everything indicates she would provide a leveling influence on Mr. Painter and could ably care for Mark.

Mr. Painter is either an agnostic or atheist and has no concern for formal religious training. He has read a lot of Zen Buddhism and "has been very much influenced by it". Mrs. Painter is Roman Catholic. They plan to send Mark to a Congregational Church near the Catholic Church, on an irregular schedule.

He is a political liberal and got into difficulty in a job at the University of Washington for his support of the activities of the American Civil Liberties Union in the university news bulletin.

There were "two funerals" for his wife. One in the basement of his home in which he alone was present. He conducted the service and wrote her a long letter. The second

at a church in Pullman was for the gratification of her friends. He attended in a sport shirt and sweater.

These matters are not related as a criticism of Mr. Painter's conduct, way of life or sense of values. An individual is free to choose his own values, within bounds, which are not exceeded here. They do serve however to support our conclusion as to the kind of life Mark would be exposed to in the Painter household. We believe it would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating.

Were the question simply which household would be the most suitable in which to raise a child, we would have unhesitatingly chosen the Bannister home. We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child. There are, however, several factors which have made us pause.

First, there is the presumption of parental preference, which though weakened in the past several years, exists by statute. Code of Iowa, Section 668.1; Finken v. Porter, 246 Iowa 1345, 72 N.W. 2d 445; Kouris v. Lunn, Iowa , 136 N.W. 2d 502; Vanden Heuvel v. Vanden Heuvel, 254 Iowa 1391, 1399, 121 N.W. 2d 216. We have a great deal of sympathy for a father, who in the difficult period of adjustment following his wife's death, turns to the maternal grandparents for their help and then finds them unwilling to return the child. There is no merit in the Bannister claim that Mr. Painter permanently relinquished custody. It was intended to be a temporary arrangement. A father should be encouraged to look for help with the children from those who love them without the risk of thereby losing the custody of the children permanently. This fact must receive consideration in cases of this kind. However, as always, the primary consideration is the best interest of the child and if the return of custody to the father is likely to have a seriously disrupting and disturbing effect upon the child's development, this fact must prevail. Vanden Heuvel v. Vanden Heuval, supra; In re Guardianship of Plucar, 247

Iowa 394, 403, 72 N.W. 2d 455; Carrere v. Prunty, Iowa , 133 N.W. 2d 692, 696; Finken v. Porter, supra; Kouris v. Lunn, supra, R.C.P. 344(F) 15.

Second, Jeanne's will named her husband guardian of her children and if he failed to qualify or ceased to act, named her mother. The parent's wishes are entitled to consideration. Finken v. Porter, supra.

Third, the Bannister's are 60 years old. By the time Mark graduates from high school they will be over 70 years old. Care of young children is a strain on grandparents and Mrs. Bannister's letters indicate as much.

We have considered all of these factors and have concluded that Mark's best interest demands that his custody remain with the Bannisters. Mark was five when he came to their home. The evidence clearly shows he was not well adjusted at that time. He did not distinguish fact from fiction and was inclined to tell "tall tales" emphasizing the big "I". He was very aggressive toward smaller children, cruel to animals, not liked by his classmates and did not seem to know what was acceptable conduct. As stated by one witness: "Mark knew where his freedom was and he didn't know where his boundaries were." In two years he made a great deal of improvement. He now appears to be well disciplined, happy, relatively secure and popular with his classmates, although still subject to more than normal anxiety.

We place a great deal of reliance on the testimony of Dr. Glenn R. Hawks, a child psychologist. The trial court, in effect, disregarded Dr. Hawks' opinions stating: "The court has given full consideration to the good doctor's testimony, but cannot accept it at full face value because of exaggerated statements and the witness' attitude on the stand." We, of course, do not have the advantage of viewing the witness' conduct on the stand, but we have carefully reviewed his testimony and find nothing in the written record to justify such a summary dismissal of the opinions of this eminent child psychologist.

Dr. Hawks is head of the Department of Child Development at Iowa State University. However, there is nothing in the record which suggests that his relationship with the Bannisters is such that his professional opinion would be influenced thereby. Child development is his specialty and he has written many articles and a textbook on the subject. He is recognized nationally, having served on the staff of the 1960 White House Conference on Children and Youth and as consultant on a Ford Foundation program concerning youth in India. He is now education consultant on the project "Head Start". He has taught and lectured at many universities and belongs to many professional associations. He works with the Iowa Children's Home Society in placement problems. Further detailing of his qualifications is unnecessary.

Between June 15th and the time of trial, he spent approximately 25 hours acquiring information about Mark and the Bannisters, including appropriate testing of and "depth interviews" with Mark. Dr. Hawks' testimony covers 70 pages of the record and it is difficult to pinpoint any bit of testimony which precisely summarizes his opinion. He places great emphasis on the "father figure" and discounts the importance of the "biological father". "The father figure is a figure that the child sees as an authority figure, as a helper, he is a nutrient figure, and one who typifies maleness and stands as maleness as far as the child is concerned."

His investigation revealed: "* * * the strength of the father figure before Mark came to the Bannisters is very unclear. Mark is confused about the father figure prior to his contact with Mr. Bannister." Now, "Mark used Mr. Bannister as his father figure. This is very evident. It shows up in the depth interview, and it shows up in the description of Mark's life given by Mark. He has a very warm feeling for Mr. Bannister."

Dr. Hawks concluded that it was not for Mark's best interest to be removed from the Bannister home. He is

criticized for reaching this conclusion without investigating the Painter home or finding out more about Mr. Painter's character. He answered:

"I was most concerned about the welfare of the child, not the welfare of Mr. Painter, not about the welfare of the Bannisters. In as much as Mark has already made an adjustment and sees the Bannisters as his parental figures in his psychological makeup, to me this is the most critical factor. Disruption at this point, I think, would be detrimental to the child even tho Mr. Painter might well be a paragon of virtue. I think this would be a kind of thing which would not be in the best interest of the child. I think knowing something about where the child is at the present time is vital. I think something about where he might go, in my way of thinking is essentially untenable to me, and relatively unimportant. It isn't even helpful. The thing I was most concerned about was Mark's view of his own reality in which he presently lives. If this is destroyed I think it will have rather bad effects on Mark. I think then if one were to make a determination whether it would be to the parents' household, or the McNelly household, or X-household, then I think the further study would be appropriate."

Dr. Hawks stated: "I am appalled at the tremendous task Mr. Painter would have if Mark were to return to him because he has got to build the relationship from scratch. There is essentially nothing on which to build at the present time. Mark is aware Mr. Painter is his father, but he is not very clear about what this means. In his own mind the father figure is Mr. Bannister. I think it would take a very strong person with everything in his favor in order to build a relationship as Mr. Painter would have to build at this point with Mark."

It was Dr. Hawks' opinion "the chances are very high (Mark) will go wrong if he is returned to his father". This is based on adoption studies which "establish that the majority of adoptions in children who are changed, from

ages six to eight, will go bad, if they have had a prior history of instability, some history of prior movement. When I refer to instability I am referring to where there has been no attempt to establish a strong relationship." Although this is not an adoption, the analogy seems appropriate, for Mark who had a history of instability would be removed from the only home in which he has a clearly established "father figure" and placed with his natural father about whom his feelings are unclear.

We know more of Mr. Painter's way of life than Dr. Hawks. We have concluded that it does not offer as great a stability or security as the Bannister home. Throughout his testimony he emphasized Mark's need at this critical time is stability. He has it in the Bannister home.

Other items of Dr. Hawks' testimony which have a bearing on our decision follow. He did not consider the Bannisters' age anyway disqualifying. He was of the opinion that Mark could adjust to a change more easily later on, if one became necessary, when he would have better control over his environment.

He believes the presence of other children in the home would have a detrimental effect upon Mark's adjustment whether this occurred in the Bannister home or the Painter home.

The trial court does not say which of Dr. Hawks' statements he felt were exaggerated. We were most surprised at the inconsequential position to which he relegated the "biological father". He concedes "child psychologists are less concerned about natural parents than probably other professional groups are." We are not inclined to so lightly value the role of the natural father, but find much reason for his evaluation of this particular case.

Mark has established a father-son relationship with Mr. Bannister, which he apparently had never had with his natural father. He is happy, well adjusted and progressing nicely in his development. We do not believe it is for Mark's best interest to take him out of this stable atmos-

phere in the face of warnings of dire consequences from an eminent child psychologist and send him to an uncertain future in his father's home. Regardless of our appreciation of the father's love for his child and his desire to have him with him, we do not believe we have the moral right to gamble with this child's future. He should be encouraged in every way possible to know his father. We are sure there are many ways in which Mr. Painter can enrich Mark's life.

For the reasons stated, we reverse the trial court and remand the case for judgment in accordance herewith.

REVERSED AND REMANDED.

All Justices concur except Thornton, J., who concurs in result.

APPENDIX C

Opinion of the District Court of Story County, Iowa

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COURT

This matter came on for hearing before the Court on plaintiff's petition in equity for a writ of habeas corpus. The petition was presented to the Court on June 3, 1965, by the plaintiff and a writ was issued and returnable at 1:30 p.m., on the 10th day of June 1965, at the courthouse at Nevada, Story County, Iowa, and on the 10th day of June 1965, the plaintiff appeared in person and by his attorney Donald R. Payer, Ames, Iowa, ready for trial, and the defendants appeared in person with their attorneys, Lundy, Butler, Wilson & Hall, of Eldora, Iowa, and on said date filed a motion for a continuance, stating that they had heretofore been represented by Smedal, Maurer & Brewer of Ames, Iowa; that said representation came to an end on the 8th day of June 1965, on which day the attorneys withdrew their appearance, and on the same day the defendants employed their present attorneys. In their motion for a continuance they alleged that they needed additional time to make the necessary investigations and to have the plaintiff examined by a psychiatrist, and that they wanted to take certain depositions. This motion for a continuance was resisted by the plaintiff, but the Court being fully advised in the premises, aware that the plaintiff had, at considerable inconvenience, made the trip from California to Nevada, Story County, Iowa, for the said trial, nevertheless the Court felt in fairness to the defendants that it was necessary to grant said continuance, and the case was continued for trial until the 12th day of July 1965, at 10:00 o'clock a.m.

Defendants filed their answer to plaintiff's petition on June 10, 1965, said answer being in three divisions, the fourth division being a counterclaim for appointment of a guardian.

This case came on for trial to the Court on July 12, 1965, the plaintiff appearing in person and by his attorney Donald R. Payer. The defendants appeared in person and with their counsel John L. Butler and Jack Hall of the firm of Lundy, Butler, Wilson & Hall of Eldora, Iowa, and the case proceeded to trial. Evidence was taken on the 12th day of July through and including the 16th day of July 1965. The Court having examined the pleadings carefully, having heard all the evidence adduced, having received briefs from both parties, (the parties waived oral argument at the conclusion of trial), having reviewed thoroughly the 28 exhibits introduced by the plaintiff, and the 52 exhibits introduced by the defendants, and being fully advised in the premises makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

This case was tried before the Court as an equitable proceeding, it being a proceeding involving the custody of a minor child, Mark Wendell Painter.

The action was brought by Harold W. Painter, as father and next friend of Mark Wendell Painter, and he will be referred to as plaintiff hereafter.

The defendants Dwight Bannister and Margaret Bannister are husband and wife, and residents of Story County, Iowa, they will be hereafter referred to as defendants.

The plaintiff Harold W. Painter is a man thirty-four years of age who resides at Walnut Creek, California, a suburb of San Francisco, California. His occupation is that of journalist, and he is presently employed by the Oakland Tribune, Oakland, California. He has followed this avocation since leaving San Francisco State College in the fall of 1955. The plaintiff has held seven or eight different jobs in the newspaper field since 1955, in varying capacities and for various salaries, his present salary being the highest attained so far.

The plaintiff was married to Jean Bannister, the eldest daughter of defendants, in Anchorage, Alaska, on April 6, 1957. At the time of their marriage they were both employed by the Anchorage Daily Times. On March 4, 1958, Mark Wendell Painter was born as issue of this marriage. A year and some months later a girl was born to these parties, and the family moved from Anchorage, Alaska, to Bremerton, Washington, then Moses Lake, Washington, then to Pullman, Washington, where the plaintiff was employed by the Washington State University, and it was during their stay in Pullman, Washington, that Jean, the wife of plaintiff, and the mother of Mark, departed this life on December 6, 1962, as a result of an automobile accident, and four days later the daughter, Janet, died as the result of injuries sustained in the same accident.

The Court finds that from the time of their marriage in 1957, until the death of the plaintiff's spouse, Jean, that they enjoyed a happy married life, and their children were well cared for; that the deceased, Jean, was a kind and loving mother and wife, and that they enjoyed a happy home life.

Naturally, the plaintiff was much upset, depressed and sorrow-laden after the tragedy within his family. He left Pullman, Washington, with his son Mark, and returned to Walnut Creek, California, to the home of his foster parents Mr. and Mrs. Leo McNelly. These foster parents had cared for the plaintiff from the time he was two and a half years of age, about which time his father and mother were divorced, and his natural parents are still alive, his natural mother being known in this record as Charlotte Betts. The plaintiff had tried his hand at free lance writing and photography, but found it necessary to take part time work and went back to work in the newspaper field in the spring of 1963. In the summer of 1963 the plaintiff arrived at a conclusion that his son, Mark, was not being properly cared for by the McNellys, at least not to his satisfaction, and requested the defendants to come to California and to take Mark back to Iowa with them and to start him in

school. The Court finds from all the evidence adduced in this case, although denied at times by the defendants, nevertheless that the arrangement was entirely a temporary basis and would continue until the plaintiff became settled in his own home with proper facilities to care for the minor son. The defendants came to California, took the grandson Mark back to Iowa to their home, Rural Route 1, Ames, Iowa, and entered the boy in school at Gilbert, Iowa, a small town north of the City of Ames, Iowa. During Mark's year in kindergarten he seems to have been somewhat of a problem, and the Court finds that the evidence shows that his problems were none other than that of a normal child of that age; that he improved greatly during the first year of school; that during that first year with the defendants, the plaintiff corresponded with his son, corresponded with the defendants, sent some money and gifts, and generally kept in touch with his son and his son's welfare.

In the summer of 1964 the plaintiff indicated his intentions to bring his son back to California because of an intended marriage. Plans were changed from time to time until the plaintiff did, in September 1964, make a visit to the defendants' home to visit his son and make arrangements for the return of his son to his custody. At this meeting in September of 1964, the plaintiff first learned that the defendants wanted to adopt Mark and wanted to keep him permanently. From this time on the relationship between the plaintiff and the defendants became strained, yet the plaintiff kept in constant conact with his son by letters and by phone calls. The plaintiff was married to Marylyn Hanson on November 28, 1964. They were married in a Catholic Church in Lafayette, California. This couple made immediate preparations to include Mark in their home life, and in the early part of June 1965, they came to Ames to return Mark to the home of his father. Here they met complete resistance from the defendants, and unfortunately, made an attempt to forcibly take the child from the school at Gilbert. Then came the application for the writ of habeas corpus.

The Court feels it necessary to make his findings as to the present Mrs. Marylyn Painter, wife of the plaintiff. She has a B. A. degree which she received in 1956, and had the honor of being Phi Beta Kappa. She has an M. A. degree received in 1964 in Graphic Arts. She has had considerable experience in working with children, and it appears to the Court that she would make a capable mother. She is a woman apparently in good health, thirty-one years of age.

From the evidence adduced and from the Court's interview with the minor, Mark Painter, it is apparent that Mark is a physically well developed boy seven years of age, considerably above average in mental abilities, pleasant, courteous and well behaved. From the evidence adduced it is apparent to the undersigned that Mark has many of his father's characteristics and exhibits a great deal of the good early training given him by his beloved mother.

The defendants, Mr. and Mrs. Dwight Bannister, live on an eighty acre farm north of Ames, Iowa, their mailing address being Route 1, Ames, but they are located in the Gilbert School District. Mr. Bannister is employed at Iowa State University and Mrs. Bannister is a housewife. The Bannisters are both sixty years of age and have raised four daughters to maturity. They have asserted in their testimony that they are worth $100,000.00. It cannot be questioned that the defendants have provided a very fine home for their grandson since he came to live with them in the late summer of 1963. In the evidence they have admitted and denied that they took Mark on a temporary basis, but now they both assert that they want to keep Mark desperately, and they both avow that the plaintiff is not suited to care for his son, Mark Painter. They also claim that the plaintiff has abandoned his son, but the Court finds to the contrary, that there is no abandonment involved in this lawsuit. Mr. and Mrs. Bannister admit that they never particularly cared for the plaintiff, and have stated that their daughter had an unhappy marriage. They came to

this conclusion by reading between the lines of her letters. However, the preponderance of the evidence adduced convinces the Court that Harold Painter and Jean Painter enjoyed a normal and happy marriage. Mr. Bannister admits that private investigators were hired since June of this year to investigate the plaintiff in California, and it appears to the Court that the defendants had wanted the custody of their grandson, Mark, since the death of their daughter, Jean. They have shown that they can give their grandson certain advantages, material and spiritual, and there is no question in the writer's mind they have in the past almost two years, done a great deal for, and have been a good influence on their grandson, Mark Painter. They have shown great love and affection for their grandson, even to excess, and they state that Mark has declared his preference to stay with them. The Court, in his interview of Mark did not ask the boy this question for obvious reasons.

The defendants offered a great deal of testimony in regard to the defendants and all of it was very good as to the defendants being good people, and the Court so finds; that they have provided well for Mark and that he has made normal improvement during his stay in their home. Many of these witnesses considered only one side of the case. The Court does not usually single out any one witness in a case, but he feels in this instance that comment should be made upon the evidence given by the expert, Dr. Hawkes. Dr. Hawkes testified he investigated this case for twenty-five hours, and concluded that it would be for the best interest of the boy to remain with the Bannisters. He also testified that he gave no consideration whatsoever to the biological father of the child, stating that the same was a mere accident and unimportant. The Court has given full consideration to the good doctor's testimony, but cannot accept it at full face value because of exaggerated statements and the witness' attitude on the stand.

In summary, the Court finds that the plaintiff, the father of Mark Painter, is a proper and fit person to have the

care and custody of his own minor son, and that it is for the best interests of the son, Mark Painter, to be reared and educated in his own father's home; that the father is the person to properly maintain his son and to properly educate him. In making this finding the Court does not cast any reflections upon defendants, Mr. and Mrs. Bannister. The Court knows they are good people, they have and did provide a good home for their grandson, but that the greater equities are with the plaintiff, he being the natural father of Mark, and there being no evidence that he is an unfit father, there being no evidence that he abandoned the child, the the Court being convinced that the grandson's stay with the Bannisters was originally on a temporary basis and that it is for the best interests of the child, Mark Painter, that he be placed permanently in the care and custody of his father.

CONCLUSIONS OF LAW

In child custody cases the law of Iowa has been many times stated by our highest Court, and they have faithfully followed the legal precepts and the moral precepts incumbent upon them. And they have stated, as this court has stated, that each case is dependent upon the factual situation, the law being well settled in this state, the Court will not trouble the parties by citing cases. However, the Court has re-read them in preparation of this case, having many times read them in several custody cases heretofore tried by this Court. The recent cast of Childres v. Childres sets forth the law very well, and the Court there wisely adapted the fact situation to the law, and we must always keep in mind the Iowa Statutes, Section 668. 1 and 2 of the 1962 Code of Iowa, which is now Section 559 of the new probate code, and of course, Rule 344(f) 15 of the Iowa Rules of Civil Procedure.

ORDER OF COURT

IT IS HEREBY ORDERED that the writ of habeas corpus issue and that the child, Mark Wendell Painter, shall

be delivered unto the permanent custody of his natural father, Harold W. Painter, and that the plaintiff shall draw all orders necessary, and that the defendants are ordered to deliver the child, Mark Wendell Painter, to his father, Harold W. Painter, forthwith.

The costs of this action shall be taxed to the defendants.

All to which the defendants are given their exception.

/s/ Ed J. Kelly
Judge of the Eleventh Judicial District.

APPENDIX D

IN THE SUPREME COURT OF IOWA

MARK WENDELL PAINTER,
a Minor, by HAROLD W. PAINTER,
his Father and Next Friend,
Plaintiff-Appellee,

vs.

DWIGHT BANNISTER and
MARGARET BANNISTER, Husband
and Wife,
Defendants-Appellants.

Appeal from Story District Court.

In this cause, the Court being fully advised in the premises, file their written opinion reversing and remanding the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby

REVERSED AND REMANDED FOR JUDGMENT IN ACCORDANCE HEREWITH

and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellee pay the costs of this appeal.

THE SUPREME COURT OF IOWA

MOTION FILED
SEP 15 1966

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

—v.—

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

PETITION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE IOWA CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA, WITH THE PROPOSED BRIEF ATTACHED

EPHRAIM LONDON
Attorney for Amici Curiae
1 East 44th Street
New York, New York 10017

HELEN L. BUTTENWIESER
Of Counsel

On the brief.

HELEN L. BUTTENWIESER
EPHRAIM LONDON
MELVIN WULF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

—v.—

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The American Civil Liberties Union moves for leave to file a brief *amici curiae* in this case. The consent of the attorney for the appellant has been obtained. The consent of the attorney for the appellees was refused. Both letters are submitted herewith.

The American Civil Liberties Union and its affiliate the Iowa Civil Liberties Union are non-profit membership organizations dedicated to the preservation of the rights guaranteed by the Bill of Rights. They consider the determination by the Iowa Supreme Court in this case to be in derogation of the constitutional rights of the father and child involved in this proceeding and a usurpation by the State of the parental rights and obligations of one who

concededly is a fit and proper parent. They also seek leave to file a brief in support of the petition because they believe the Supreme Court of Iowa, in reaching its determination, violated the First and Fourteenth Amendment commandments that church and state shall remain separate and that no persons shall be deprived of religious or political freedom.

Respectfully submitted,

EPHRAIM LONDON
Attorney for Movants
1 East 44th Street
New York, New York 10017

HELEN L. BUTTENWIESER
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

—v.—

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AND THE IOWA CIVIL LIBERTIES UNION *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

EPHRAIM LONDON
Attorney for Amici Curiae
1 East 44th Street
New York, New York 10017

HELEN L. BUTTENWIESER
Of Counsel

On the brief

HELEN L. BUTTENWIESER
EPHRAIM LONDON
MELVIN WULF

INDEX

PAGE

Interest of Amici 1

Statement 2

Reasons for Granting Writ 4

POINT I

The right of a fit parent, who has not abandoned his child, to live with and to raise his child and the concomitant rights of the child, are protected by the Fourteenth Amendment and may not be abridged by a State unless the child's welfare would be put in jeopardy by the exercise of those rights. Those rights may not be violated because a court believes other persons are better equipped to act in the role of parent 4

POINT II

Consideration of the father's religious beliefs as a relevant, if not the controlling factor in determining his right to custody of his child, is a violation of the First and Fourteenth Amendments to the Constitution in that such consideration promotes the establishment of a religion and abridges the religious liberty of the father 9

PAGE

POINT III

Consideration of the father's political attitude as a relevant, if not a controlling, factor in determining his right to custody of his child abridges political rights guaranteed by the First and Fourteenth Amendments 11

CONCLUSION 12

INDEX TO CITATIONS

American Communications Association, C.I.O. v. Douds, 339 U.S. 382 (1950) 11

In re Guardianship of Smith, 265 P.2d 888, 42 Cal.2d 91 (1954) 8
In re Kailer, 123 Kan. 229, 225 Pac. 41 (1927) 8

Meyer v. Nebraska, 262 U.S. 390 (1923) 5

People ex rel. Anonymous v. Louise Wise Services, 250 N.Y.S.2d 507 (1964) 7
People ex rel. Kropp v. Shepsky, 113 N.E.2d 801, 305 N.Y. 465 (1953) 6
People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 896 (1952) 7
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 5
Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) 4, 7

Smith v. Smith, 90 Ariz. 190, 367 P.2d 230 (1961) 10
Stubbs v. Hammond, 135 N.W.2d 540 (Iowa, 1965) 7

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

—v.—

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF OF *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union and its affiliate, the Iowa Civil Liberties Union are non-profit membership organizations dedicated to the preservation of the rights guaranteed by the Bill of Rights. They sought the parties' consent to the filing of this brief because they consider the determination by the Iowa Supreme Court in this case to be in derogation of the constitutional rights of the father and child involved in this proceeding and a usurpa-

tion by the State of the parental rights and obligations of one who concededly is a fit and proper parent. They also file this brief in support of the Petition because they believe the Supreme Court of Iowa, in reaching its determination violated the First and Fourteenth Amendment commandments that church and state shall remain separate, and that no persons shall be deprived of religious or political freedom.

Statement

The subject matter of this proceeding is the right of Harold Painter to have custody of his seven year old son Mark. The Court below awarded custody to the child's maternal grandparents, Margaret and Dwight Bannister.

Harold Painter, now 35 years of age, is a devoted family man (R. 39, 42, 43, 48, 65) (see also findings of the trial court, Petitioner's brief, Appendix C, pp. 15a, 16a). The warm, close-knit family relationship between Harold Painter, his first wife, Jeanne, and their children Mark and Janet came to a tragic end with the death of his wife in an automobile accident (R. 38, 45, 48, 52). (Janet was also killed in the accident.) Except for a short period, when he tried to earn a living as a free-lance writer (R. 5), Painter's income as a newspaper writer or editor ranged between $100.00 a week and $200.00 a week (R. 35, 38, 43, 62).

After his wife's death Painter tried to keep Mark with him, but found that his need to earn a living interfered with what he considered to be proper care for Mark (R. 59-61, 63-66). At his request, Mark's maternal grandparents took Mark to live with them until Painter's circumstances made it possible for him to have Mark back (R. 67).

A year after Mark went to live with his grandparents, Painter became engaged to be married, and asked for Mark's return, which was refused (R. 77, 78). After Painter and his second wife, Marilyn, a college graduate who had considerable experience with children were married and had bought a home for Mark and themselves, they again tried to have Mark returned to them (R. 150-152, District Court's findings of fact, Petitioner's brief, Appendix C, pp. 14a-21a). When their requests were refused this suit was commenced (R. 96-102, 104, 164, 165).

The District Court of Story County, Iowa, found Harold Painter to be a fit parent who had not abandoned his child and awarded custody of the child to him (see District Court's opinion, Petitioner's brief, Appendix C, pp. 19a-20a). On appeal taken by Mark's grandparents the Supreme Court of Iowa also found Harold Painter to be a fit parent who had not abandoned his child (see Court's opinion, Petitioner's brief, Appendix B, p. 5a), but awarded custody to the grandparents because, it decided, that was in the best interests of the child (see Court's opinion, Petitioner's brief, Appendix B, p. 9a).

REASONS FOR GRANTING WRIT

POINT I

The right of a fit parent, who has not abandoned his child, to live with and to raise his child and the concomitant rights of the child, are protected by the Fourteenth Amendment and may not be abridged by a State unless the child's welfare would be put in jeopardy by the exercise of those rights. Those rights may not be violated because a court believes other persons are better equipped to act in the role of parent.

Although the District Court of Story County, Iowa awarded custody of Mark to his father, the Supreme Court of Iowa reversed the lower court and awarded custody to the grandparents on the totally invalid assumption that the court had the right and obligation, purportedly in the child's best interests, to determine whether someone other than the child's natural parent could provide him with a superior environment.

Once it was determined that Harold Painter was a fit parent who had not abandoned his child, and that there was no reason to believe that his custody and control would result in injury to the child, the Court was not justified in interfering with his right to raise the child. The right of a parent to bring up his child is a constitutionally protected right that this Court has long recognized. In *Prince* v. *Commonwealth of Massachusetts,* 321 U.S. 158, 166 (1944), this Court said:

> "... It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose pri-

> mary function and freedom include preparation for obligations *the state can neither supply nor hinder.* Pierce v. Society of Sisters . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." (Emphasis added.)

In *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), the Court held legislation to be unconstitutional because it "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children" and stated further (at page 535): "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children. . . .". As Jessamyn West wrote of the opinion and decision of the Iowa Supreme Court in this case "The only place outside of *Alice in Wonderland* or Franz Kafka that such reasoning seemed possible was one of the totalitarian countries where the state disregarding the rights of parents, can determine the mold in which the child is to be shaped." The Ladies Home Journal, May, 1966, p. 88.

In *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), this Court, in striking down a statute that made it illegal to teach a foreign language before a child had completed the eighth grade stated at page 399:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error (the child's father) by the 14th Amendment. 'No state . . . shall deprive any person of life, liberty, or property without due process of law.'

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children,* to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Emphasis and matter in parentheses added.)

In the instant case, the Iowa Supreme Court determined that the care and upbringing of the child should be wrested from his father, and vested in his grandparents because, in the Court's opinion, the grandparents, in their sixties, offered a more stable existence. Life with the Petitioner's father, the Court believed, " . . . would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating". Court's opinion, Petitioner's brief, Appendix B, p. 8a.

The role of the court as protector of children against their natural parents is limited to cases involving mistreatment or mishandling by the parent that will in some way endanger the child's health or welfare. In the instant case, the court's right to interfere with the father's custody of his child ended when it found that the father was fit and had not forfeited his right to care for his child by abandoning or failing properly to care for him. As the Court of Appeals of New York said in *People ex rel. Kropp* v. *Shepsky,* 305 N.Y. 465, 469, 113 N.E.2d 801, 803 (1953):

> "No Court can for any but the gravest reasons, transfer a child from its natural parent to any other person . . ."

See also *People ex rel. Portnoy* v. *Strasser,* 303 N.Y. 539, 104 N.E.2d 896 (1952), and *Stubbs* v. *Hammond,* 135 N.W.2d 540 (Iowa, 1965). An appellate court's supposition that a child's welfare will be advanced by turning him over to someone wealthier and more conservative than his natural parent is not a sufficiently grave reason for depriving the parent of custody. The general maxim that a child is a ward of the court and that the court should act in what it deems to be in the child's best interests may not be stretched to justify the court's assuming the role of a parent's surrogate, when the parent is able and wishes to take care of his child himself. Certainly those maxims cannot be distorted and misapplied to permit the court to take a child from his natural, fit parent where there is no reason to believe that the parent will expose the child to physical danger or will refuse to educate the child or will in any way mistreat him. *Prince* v. *Commonwealth of Massachusetts,* 321 U.S. 158, 167 (1944). In *People ex rel. Anonymous* v. *Louise Wise Services,* 21 A.D.2d 327, 250 N.Y.S.2d 507 (1964), the court, in awarding the child to its parents, despite the fact that the adoptive parents could have furnished a superior environment, stated at 21 A.D.2d 329, 250 N.Y.S.2d 510:

> "But neither the agency nor the courts should indulge in omnipotent parent selection except in the cases where the unfitness of the parents is *unequivocal* or the welfare of the child *unequivocally* mandates otherwise." (Emphasis ours.)

We doubt the competence of a trial court to make such a selection. "It would seem inherent in the concept of a fit parent that such a parent would be at least as responsive as the trial court and very probably more so, to the best interests of the child." Traynor, *J.*, concurring in *In re Guardianship of Smith,* 42 Cal.2d 91, 95, 265 P.2d 888, 891 (1954).

An appellate court would seem even less qualified than a trial court, to make a wise decision with respect to a child's best interests.

In *In re Kailer;* 123 Kan. 229, 231, 225 Pac. 41, 42 (1927), the Kansas Supreme Court said:

> "Under the law of the land, the welfare and best interests of children are primarily the concern of their parents, and it is only when parents are unfit to have the custody, rearing, and education of children that the state as *parens patriae,* with its courts and judges, steps in to find fitting custodians *in loco parentium.*"
>
> "And it never becomes a judicial question as to what is for the welfare and best interests of children until the exceptional case arises where the parents are dead, or where they are unfit to be intrusted with the custody and rearing of their children and have forfeited this right because of breach of parental duty, or where the right has been prejudiced by the discord of the parents themselves. . . . And no court should construe its intrusive jurisdiction as extending to cases where parents have done nothing offensive to law, morals, or good conduct, which would forfeit their paramount natural right of parenthood, which is to have custody of their own children."

POINT II

Consideration of the father's religious beliefs as a relevant, if not the controlling factor in determining his right to custody of his child, is a violation of the First and Fourteenth Amendments to the Constitution in that such consideration promotes the establishment of a religion and abridges the religious liberty of the father.

In making its decision, the court below examined several of Harold Painter's "philosophies", which it felt were "important as they relate to [the child] and his particular needs". "Mr. Painter", the Court said, "is either an agnostic or atheist and has no concern for formal religious training. He has read a lot of Zen Buddhism and 'has been very much influenced by it'. Mrs. Painter is Roman Catholic. They plan to send Mark to a Congregational Church near the Catholic Church, on an irregular schedule." Opinion of the Iowa Supreme Court, Petitioner's brief, Appendix B, p. 7a.

In deciding whether the child was to be reared by his father or his maternal grandparents, the Iowa Supreme Court admittedly was influenced by Harold Painter's religious background and beliefs. The court thus made it plain that a father who wishes to keep or regain the custody of his child, should observe certain forms of religion approved by the court or have his personal religious beliefs, atheism or agnosticism, count against him.

The Constitution forbids any coercion to follow a creed or to practice a form of worship, even by indirection.

> ". . . [N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or

other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943).

And in *Smith* v. *Smith,* 90 Ariz. 190, 193, 367 P.2d 230, 233 (1961), the Court said:

"Since the decision in West Virginia State Board of Education v. Barnette . . . it has been the uniform judgment of every court reaching the question that if a teaching does not conflict with the fundamental law of the land a parent may not be deprived of the custody of a child because of the court's disagreement with such parent as to religious beliefs . . . a parent who teaches a child doctrines at variance with majority views does not give rise to grounds sufficient to support a change of custody."

POINT III

Consideration of the father's political attitude as a relevant, if not a controlling, factor in determining his right to custody of his child abridges political rights guaranteed by the First and Fourteenth Amendments.

Any state action that penalizes an individual for his political views or attitudes clearly infringes the constitutionally guaranteed right of freedom of belief and expression. *American Communications Assn., C.I.O.* v. *Douds*, 339 U.S. 382, 393 (1950).

The court below made the following comment on Harold Painter's views:

> "He is a political liberal and got into difficulty in a job at the University of Washington for his support of the activities of the American Civil Liberties Union in the university news bulletin." Opinion of the Iowa Supreme Court, Petitioner's brief, Appendix B, at p. 7a.

Clearly, the Court considered Harold Painter's political (in the Court's view) liberalism in determining whether he had a right to bring up his child and in taking that into consideration abridged his constitutional rights.

CONCLUSION

The writ of certiorari should be granted. The several important questions arising under the United States Constitution outlined in this brief have not heretofore been considered by this Court and should be determined.

Respectfully submitted,

EPHRAIM LONDON
Attorney for the American Civil Liberties Union, and the Iowa Civil Liberties Union, Amici Curiae
1 East 44th Street
New York, New York 10017

HELEN L. BUTTENWIESER,
Of Counsel

On the brief

HELEN L. BUTTENWIESER
EPHRAIM LONDON
MELVIN WULF

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

Office-Supreme Court, U.S.
FILED
SEP 16 1966
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

vs.

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

Brief of the State of California Amicus Curiae, in Support of Petition

THOMAS C. LYNCH
Attorney General
6000 State Building
San Francisco, California

ELIZABETH PALMER
Deputy Attorney General
6000 State Building
San Francisco, California

Attorneys for the State of California, Amicus Curiae

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Interest of the State of California	2
Argument	3
I. The Right of a Fit Parent, Who Has Not Abandoned His Child and Who Can Give the Child an Adequate Home, to the Custody of His Child in Preference to a Stranger and the Right of the Child to Be in the Custody of His Parent Are Fundamental Rights Protected by the Constitution of the United States	3
II. It Is the Law of California That a Fit Parent Who Has Not Abandoned His Child and Who Can Give the Child an Adequate Home Is Entitled to Custody in Preference to a Non-Parent	6
Conclusion	12
Appendix A	

TABLE OF AUTHORITIES CITED

Cases	Pages
Bolling v. Sharpe, 347 U.S. 497 (1954)	4
Gitlow v. New York, 268 U.S. 652 (1925)	3
Griswold v. Connecticut, 381 U.S. 479 (1965)	3
Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888 (1954)	9
In re Green, 192 Cal. 714, 221 P. 903 (1923)	8
In re Prehoda's Guardianship, 194 Iowa 308, 189 N.W. 719 (1922)	7
In re Skinner's Guardianship, 230 Iowa 1016, 300 N.W. 1, (1941)	7
In re White, 54 Cal. App. 2d 637, 129 P.2d 706 (1942)	7
Jenkins v. Clark, 71 Iowa 552, 32 N.W. 504 (1887)	7
Joiner v. Knieriem, 243 Iowa 470, 52 N.W. 2d 21 (1952)	4
Lerner v. Superior Court, 38 Cal. 2d 676, 242 P.2d 321 (1952)	8
May v. Anderson, 345 U.S. 528 (1953)	4
Meyer v. Nebraska, 262 (1923)	3
Morgan v. Morgan, 217 Cal. App. 2d 535, 31 Cal. Rep. 682 (1963)	8
N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958)	4
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	3, 4
Prince v. Massachusetts, 321 U.S. 158 (1944)	3
Roche v. Roche, 25 Cal. 2d 141, 152 P.2d 999 (1944)	7
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	3
Smith v. Smith, 45 Cal. 2d 235, 288 P.2d 497 (1955)	2
Stewart v. Stewart, 41 Cal. 2d 447, 260 P.2d 44 (1953)	7
Stubbs v. Hammond, 135 N.W. 2d 540 (Iowa 1965)	4
Van Auken v. Wieman, 128 Iowa 476, 104 N.W. 464 (1905)	4
Watters v. Watters, 243 Iowa 741, 53 N.W. 2d 162 (1952)	4
Wooley v. Schoop, 234 Iowa 657, 12 N.W. 2d 597 (1944)	4
Yarborough v. Yarborough, 290 U.S. 202 (1933)	2

STATUTES

Pages

Cal. Gvt. Code § 233(d) 2

TEXTS

Restatement, Conflict of Laws:
§ 30 (1934) 2
§ 144 7

CONSTITUTION

United States Constitution, Fourteenth Amendment 3

OTHER AUTHORITIES

1960 Census of Population, Volume 1, characteristics of the population, part 6, California Table 98, page 6-483 2

"Standards for Juvenile and Family Courts", U.S. Department of Health, Education, and Welfare, Children's Bureau Publication No. 437-1966 5

U.S. Bureau of the Census, Statistical Abstract of the United States: 1965. (86th ed.) Table No. 182, page 132 5

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

vs.

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

Brief of the State of California Amicus Curiae, in Support of Petition

The State of California, as amicus curiae, respectfully supports the petition of Mark Wendell Painter, a minor, by Harold W. Painter, his father and next friend, praying that a Writ of Certiorari issue (hereinafter referred to as "petition") to review the judgment of the Supreme Court of Iowa entered February 8, 1966, rehearing denied June 13, 1966.[1] For Opinions Below, Jurisdiction, Questions

1. With the permission of the Supreme Court of Iowa the State of California filed an amicus curiae brief on behalf of petitioner herein in support of the petition for reconsideration of that court's decision of February 8, 1966. The State of California also filed an application for leave to intervene as plaintiff-appellee. The order denying rehearing made no reference to the application. (R. 938)

Presented, Constitutional and Statutory Provisions involved and Statement of the case, see the petition.

INTEREST OF THE STATE OF CALIFORNIA

The interest of the State of California in what might appear to be purely private litigation is substantial. California is the unquestioned and unquestionable state of domicile of Harold Painter's son, Mark. Cal. Gvt. Code § 233(d); *Smith v. Smith*, 45 Cal. 2d 235, 288 P.2d 497 (1955); *Yarborough v. Yarborough*, 290 U.S. 202, 211 (1933); Restatement, *Conflict of Laws* § 30 (1934). The State of California has a legitimate interest in the welfare of its domiciliaries and the preservation of their families.

Large numbers of Californians have family ties to other states. Only 43.7 per cent of the Californians counted in the 1960 census were born in California.[2] Net migration to California from the other states and the District of Columbia in the period 1955-60 totaled 1,122,204 persons. (Appendix A, *infra*). If the decision below stands, California citizens with family ties in sister states will face the risk of losing the custody of their children through no fault, defect or wish of their own where, because of family tragedy, they act for the welfare and best interests of the children by leaving them temporarily with out-of-state relatives.

As we shall show in our argument below, those Californians have a justifiable expectation, founded upon the law of their own state, that their families will in the normal and natural course be reunited if they are fit parents —that they need not prove to the satisfaction of a judge or group of judges or other officials that their child will

2. U.S. Bureau of the Census, U.S. census of population: 1960. Vol. 1, characteristics of the population. Part 6, California, Table 98, page 6-483.

be better off with them than with the relatives who have had him in their temporary care. Under accepted conflict of laws rules, recognizing the primary interest of the state of family domicile, this rule of California law should have been applied in this case. It was not.

It is for these reasons that the State of California joins petitioner in asking that the writ be granted and in urging this Court to render a prompt and final determination of the constitutional issues raised in this case.

ARGUMENT

I. The Right of a Fit Parent, Who Has Not Abandoned His Child and Who Can Give the Child an Adequate Home, to the Custody of His Child in Preference to a Stranger and the Right of the Child to Be in the Custody of His Parent Are Fundamental Rights Protected by the Constitution of the United States.

This Court has declared that there are fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment of the United States Constitution from impairment by the States. *Griswold v. Connecticut,* 381 U.S. 479, 483 (1965). Among those personal rights and liberties held to be protected from governmental intrusion are: the right of marital privacy, *Griswold v. Connecticut, supra;* the right to direct the upbringing and education of one's children, *Pierce v. Society of Sisters,* 268 U.S. 510, 534 (1925); the right to marry, establish a home and bring up children, *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); the right to custody, care and nurture of one's child, *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944); the right to pursue an occupation, *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957); freedom of speech and of the press, *Gitlow v. New York,* 268 U.S. 652, 666 (1925); freedom to associate and

privacy in such association, *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 462 (1958). This Court further declared in *May v. Anderson,* 345 U.S. 528, 533 (1953) that the right to custody of one's child is far more precious than property rights.

The Court has not hesitated in the foregoing cases and others cited by petitioner to find that certain rights are so fundamental that they are included in the conception of due process of law and entitled to protection from invasion by State action.

In *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954), it was stated, "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for proper governmental objective."

The State of Iowa through its highest court has deprived Mark Wendell Painter and his father of the very liberties recognized by that court only a year ago in *Stubbs v. Hammond,* 135 N.W. 2d 540, 543 (Iowa 1965).The Iowa Supreme Court then held, "The right of a child to the care, support and affection of his parents, and the right of parents to have custody of their child and furnish him care, support and affection are inherent constitutionally protected liberties," citing *Pierce v. Society of Sisters,* 268 U.S. 510.[3]

In this case although the court below found the father to be fit,[4] that he had placed his child with the maternal

---

3. To the same effect: *Watters v. Watters,* 243 Iowa 741, 744, 53 N.W.2d 162, 163 (1952); *Joiner v. Knieriem,* 243 Iowa 470, 479, 52 N.W.2d 21, 26 (1952); *Wooley v. Schoop,* 234 Iowa 657, 660, 12 N.W.2d 597, 599 (1944); *Van Auken v. Wieman,* 128 Iowa 476, 104 N.W. 464 (1905).

4. The record will show that the Social Services Department of the County of Contra Costa, State of California, at the request

grandparents on a temporary basis out of sheer necessity, and that he had not abandoned him, it nonetheless reversed the trial court and awarded permanent custody of this boy, now eight years old, to the grandparents.

Despite the court's disclaimer (Petition App. B, p. 5a) the conclusion is inescapable that the judgment was based wholly on the court's preference for "a stable, dependable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it."[5]

In assessing the relative merits of the two homes the court found "It [the Bannister home] provides a solid foundation and secure atmosphere. In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable." (Petition, App. B, p. 5a). "We believe [the kind of life Mark would be exposed to in the Painter household] would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating. . . . We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child." (Petition, App. B, p. 8).

In "Standards for Juvenile and Family Courts" (U.S. Department of Health, Education, and Welfare, Children's Bureau Publication No. 437-1966 prepared in cooperation with the National Council on Crime and Delinquency and the

---

of the Department of Social Welfare of the State of Iowa made a study of the Painter home and reported that the home was adequate in size, in good repair, and should be comfortable and pleasant for the boy. (C.T. Ex. I).

5. Educational opportunities do exist in California. The 1964 total enrollment in California's 179 Institutions of higher education was 667,902. U.S. Bureau of the Census, Statistical Abstract of the United States: 1965. (86th ed.) Table No. 182, page 132.

National Council of Juvenile Court Judges) the mutual rights of parents and children are given far greater regard and protection than that given by the court below despite the fact that the Juvenile Court is concerned with neglected or delinquent children, a far cry from the factual situation presented here. At pages 4-5 of the "Standards for Juvenile and Family Courts" it is stated:

> "In proceedings on behalf of children, basic rights of both parent and child are involved. The rights of parents to care for their children and to exercise their discretion in meeting the needs of their children are basic to our society. Equally basic are the rights of children to maintain their personal liberty from other than parental or normal community restraint, to live with their parents, and to have someone legally responsible for protecting their interests. The behavioral sciences, in emphasizing the importance to a child of his own parents, have further confirmed what tradition, religion, and common sense have long accepted as true.[6]

II. It Is the Law of California That a Fit Parent Who Has Not Abandoned His Child and Who Can Give the Child an Adequate Home Is Entitled to Custody in Preference to a Non-Parent.

The law of California likewise emphasizes "the importance to a child of his own parents" and thus recognizes the teaching of "tradition, religion, and common sense"—and of the United States Constitution. Under California law there is no room for depriving a fit parent, who has not abandoned his child, of custody of the child in favor of strangers.

---

6. *Contra,* Glenn R. Hawkes, Ph.D., the child psychologist on whose testimony the Court below placed "a great deal of reliance" (Petition, App. B, p. 9a). The trial court expressly discounted Dr. Hawkes testimony (Petition, App. C, p. 19).

This is the law that, according to accepted rules of the conflict of laws, should have been applied by the Iowa courts in this case. As we have said, Mark Painter is a California domiciliary because of the California domicile of his father.[7] (*Supra*, p. 2) Section 144 of the Restatement of the Conflict of Laws and the same section of the latest tentative draft of the Second Restatement (No. 4, 1957) provide that "the law of the state of the child's domicile determines the right to its custody."

The leading California case is *Roche v. Roche*, 25 Cal. 2d 141, 152 P.2d 999, 1000 (1944). Therein the court quoted and approved the statement in *In re White*, 54 Cal. App. 2d 637, 640, 129 P.2d 706, 708 (1942):

> "The right of a parent to the care and custody of a child cannot be taken away merely because the Court may believe that some third person can give the child better care and greater protection. One of the natural rights incident to parenthood, a right supported by law and sound public policy is the right to the care and custody of a minor child, and this right can only be forfeited by a parent upon proof that the parent is unfit to have such care and custody."

Again in *Stewart v. Stewart*, 41 Cal. 2d 447, 451, 260 P.2d 44, 47 (1953), the Court held:

> "Where a parent applying for custody is in a position to take the child and is not shown to be unfit, the Court may not award custody to strangers merely because it feels that they may be more fit or that they may be more able to provide financial, educational or other benefit."

In *Stewart* the Court stated unequivocally that the law of California contemplates that the care of a minor child

---

7. This proposition is recognized in Iowa. *In re Skinner's Guardianship*, 230 Iowa 1016, 300 N.W. 1, 3 (1941); *In re Prehoda's Guardianship*, 194 Iowa 308, 189 N.W. 719 (1922); *Jenkins v. Clark*, 71 Iowa 552, 32 N.W. 504 (1887).

be awarded to a parent, if a fit and proper person, as against a stranger. As between a parent and a grandparent, the latter is a stranger to an action involving child custody and the parents' rights are paramount. *Morgan v. Morgan,* 217 Cal. App. 2d 535, 31 Cal. Rep. 682, 683 (1963).

It is the parent, not the grandparents, who has the right to companionship of his child. It is the parent, not the grandparents, who has the right to make decisions regarding his child's care and control, education, health and religion. *Lerner v. Superior Court,* 38 Cal. 2d 676, 681, 242 P. 2d 321, 323 (1952).

It is not a requisite for child custody that the parent at all times have been a paragon of virtue, thrift and industry. In *In re Green,* 192 Cal. 714, 221 P. 903, 906 (1923) the court held,

> "In addition to all this, it must be remembered that a parent, if competent, does not lose his right over his child merely because his conduct may at one time have fallen short of what may be described as 'ideal' ".

The law of California concerning parental right to custody of a minor son does not consider the social or economic acceptability of the religion espoused by the parent or his political beliefs; the right is not affected one way or the other by the fact that the parent comes or does not come from a "stable, dependable, conventional, middle-class, middle-west background"; it is not affected by whether the parent is or is not a college graduate. Nor is a California court entitled, in deciding the claims of a parent versus a non-parent, to consider that the non-parents' greater material possessions is a plus factor and the probability of intellectual stimulation by the parent is a minus factor. Under California law, and under the Constitution of the United States, such considerations are irrelevant as between parent and non-parent where the parent is not unfit.

Justice Traynor (now Chief Justice) in a concurring opinion in *Guardianship of Smith,* 42 Cal. 2d 91, 265 P. 2d 888, 891-892, (1954) carefully examined the California doctrine. The opinion states in relevant part:

> "The objection to the rule that custody must be awarded to the parent unless he is unfit carries the harsh implication that the interests of the child are subordinated to those of the parent when the trial court has found that the best interests of the child would be served by giving his custody to another. The heart of the problem, however, is how the best interests of the child are to be served. Is the trial court more sensitive than the parent to what the child's best interests are, better qualified to determine how they are to be served? It would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, and very probably more so, to the best interests of the child. The rule requiring that custody be awarded to such a parent in preference to a stranger does not operate to subordinate the interests of the child to those of the parent; it merely serves to define the area of the parent's responsibility for the welfare of the child. The court's statutory duty to be 'guided by what appears to be for the best interests of the child in respect to its temporal and mental and moral welfare' (Prob. Code, § 1406) encompasses the view that the child's welfare is part of the responsibility of a fit parent.
>
> "One gains perspective by recalling that families are ordinarily allowed to function without outside interference though their wisdom in the upbringing of children may vary as widely as the physical heritage or economic advantages they give their children. Unless the upbringing of the child is so defective as to call for action by the juvenile court, it is unlikely that an outsider will challenge the parental custody or seek by legal process to prove that the child's welfare would best be served elsewhere. It is generally understood

that the stability of established family units would be jeopardized by outside interference.

"It is only when the family is dissolved by death, divorce or separation that conflicting claims to custody are likely to arise. If the parents are divorced and no third parties are involved, the court of necessity arbitrates whatever conflicting claims the parents may have to the custody of the childen. If one parent dies, however, or upon divorce is unable or unfit to have custody of a child, outsiders may enter the picture and attack the competence of the other parent to have custody or contend that the child would be better off with them. The problem may also arise if the parent awarded custody at the time of divorce dies or for other reasons is no longer able to care for the child, or if one or both parents have through necessity been unable for a time to care for the child themselves, but thereafter seek to regain custody from outsiders whose assistance they had solicited in the interim.

"Ordinarily in any of these circumstanees the determination of what course will best serve the interests of the child will involve the consideration of numerous imponderables. All things being equal, it is clear that the parent should have custody. All things are ordinarily not equal, however. The outsider may be able to offer the child greater material advantages. In the case of the death of the parent having custody after divorce, the child may be on more intimate terms with relatives or a new spouse of the deceased parent than with the other parent who has not had custody. If the child has not been in the custody of either parent he may have been successfully integrated into the home of the person who has been caring for him. The parent seeking custody may have remarried so that if custody is awarded to him, the child will be faced with the problem of adjusting to a stepparent. On the other hand, the importance of preserving the relationship between

a natural parent and his child cannot be gainsaid. . . . Moreover, even if the child is required to make some sacrifice to be with his natural parent or adjust to a new environment, it does not necessarily follow that his welfare will be correspondingly impaired. It may not be to the best interest of the child to have every advantage. He may derive benefits by subordinating his immediate interests to the development of a new family relationship with his own parent, by giving as well as receiving. Thus, although a change in custody from an outsider to a parent may involve the disruption of a satisfactory status quo, it may lead to a more desirable relationship in the long run.

". . . .

"Psychology is not an exact science. If expert testimony were introduced in cases such as this in all probability it would be in conflict. The ordinary judge as well as the ordinary parent lacks the omniscience accurately to evaluate all of the various considerations that may enter into a custody problem. 'The essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, health, and religion.' (*Lerner v. Superior Court,* 38 Cal. 2d 676, 681 [242 P.2d 321]) If a parent is fit he will be vitally concerned with the best interests of his child. By leaving to him the responsibility as to how those interests will be best served the court simply recognizes that 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. *Pierce v. Society of Sisters, supra,* [268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468]. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.' (*Prince v. Massachusetts,* 321 U.S. 158, 166 [64 S. Ct. 438, 88 L. Ed. 645].)"

The Iowa Court, departing from the law of California and applying its own standards to determine that the best interests of Mark Painter required that he be kept apart from his father in the home of his Iowa grandparents, has invaded the private realm of family life that under our system is meant to be sacrosanct. The invasion cannot, we believe, be justified under the United States Constitution, and the decision of the Iowa court should therefore be reviewed here.

CONCLUSION

For the foregoing reasons, the State of California urges that certiorari issue to review the decision of the court below.

Dated, San Francisco, California
September 15, 1966

Respectfully submitted,

THOMAS C. LYNCH
Attorney General

ELIZABETH PALMER
Deputy Attorney General

Attorneys for the State of California, Amicus Curiae

(Appendix A Follows)

Appendix A

CALIFORNIA MIGRATION 1955-1960
Department of Finance, Budget Division
Financial and Population Research Division
Sacramento 1964

NET MIGRATION TO CALIFORNIA BY STATE

TOTAL	1,122,204
Regions	
Northeast	223,946
North Central	473,899
South	259,759
West	164,600
Divisions	
New England	58,068
Middle Atlantic	165,878
East North Central	291,415
West North Central	182,484
South Atlantic	66,027
East South Central	44,200
West South Central	149,532
Mountain	77,149
Pacific	87,451
States	
Maine	3,377
New Hampshire	2,584
Vermont	2,261
Massachusetts	31,713
Rhode Island	7,506
Connecticut	10,627
New York	98,856
New Jersey	23,187
Pennsylvania	43,835
Ohio	68,630
Indiana	31,289
Illinois	100,020
Michigan	67,746
Wisconsin	23,730
Minnesota	32,969
Iowa	36,419
Missouri	36,719
North Dakota	9,741
South Dakota	11,663
Nebraska	23,734
Kansas	31,239
Delaware	699
Maryland	10,274
District of Columbia	7,636
Virginia	10,632
West Virginia	7,758
North Carolina	10,023
South Carolina	2,900
Georgia	7,598
Florida	8,507
Kentucky	8,449
Tennessee	16,000
Alabama	9,867
Mississippi	9,884
Arkansas	18,689
Louisiana	18,020
Oklahoma	29,170
Texas	83,653
Montana	9,222
Idaho	8,331
Wyoming	4,205
Colorado	24,566
New Mexico	12,425
Arizona	11,994
Utah	10,386
Nevada	−3,980
Washington	41,691
Oregon	29,254
Alaska	1,192
Hawaii	15,314

Source: U. S. Bureau of the Census. PC(2)-2B *Mobility for States and State Economic Areas*

MOTION FILED
OCT 2 1966
LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

—v.—

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

MOTION BY THE BOARD OF CHRISTIAN SOCIAL CONCERNS, NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI WITH THE PROPOSED BRIEF ATTACHED

RANDOLPH J. SEIFERT
Attorney for the Board of Christian Social Concerns, New York Annual Conference of The Methodist Church
11 East 44th Street
New York, New York 10017

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

—*v.*—

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

This is a motion by the Board of Christian Social Concerns of the New York Annual Conference of The Methodist Church for leave to file a brief *amicus curiae* in the above entitled action. The consent of the attorneys for the petitioner has been obtained; the consent of the attorneys for the respondents has been denied.

The Annual Conference is the basic body of the Methodist Church. The United States is divided geographically into approximately 100 such Annual Conferences. The New York Annual Conference embraces some five hundred churches in the city of New York, Long Island, Westchester, the Hudson Valley south of Troy, and Connecticut west of the Connecticut River.

The Methodist Church, through its Discipline, provides for each Annual Conference to have a Board of Christian Social Concerns, among whose responsibilities is the task of lifting up before the members of the Church and the secular world specific issues which bear upon the well-being of the society in which we all dwell.

It is our view that fundamental to the Judeo-Christian tradition is the belief that God has made the family the basic unit of society. While the instant case is concerned with conflicting claims of custody of a single child, the decision of the Court below could have far reaching effects on the family relationship, inconsistent with the guarantees implicit in the Constitution.

This motion is made to voice the concern of all families who look to the religious community to speak out in support of the sanctity of the family unit.

Respectfully submitted,

RANDOLPH J. SEIFERT
Attorney for the Board of Christian Social Concerns, New York Annual Conference of The Methodist Church
11 East 44th Street
New York, New York 10017

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner,

—v.—

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

BRIEF OF THE BOARD OF CHRISTIAN SOCIAL CONCERNS, NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

RANDOLPH J. SEIFERT

Attorney for the Board of Christian Social Concerns, New York Annual Conference of The Methodist Church

11 East 44th Street

New York, New York 10017

INDEX

	PAGE
Interest of *Amicus*	1
Statement	2
Questions Presented	2
Reason for Granting Writ	3
POINT I—A state may not abridge the sanctity of the family by ordering the custody of an infant child to be taken from its concededly fit parent, which parent has not abandoned or surrendered custody of the infant, consistent with the guarantee of the due process clause of the Fourteenth Amendment	3
POINT II—A state may not violate family sanctity by ordering custody of an infant to be transferred from a fit parent who has not surrendered or abandoned such infant, because of the political or religious beliefs of such parent, consistent with the guarantees of the First, and due process clause of the Fourteenth, Amendments	5
Conclusion	7

TABLE OF CASES CITED

American Communications Ass'n v. *Douds*, 339 U.S. 382 (1950)	6
Bell v. *Leonard*, 251 Fed. 2d 890 (1958)	4
Blow v. *Lottman*, 75 S.D. 127, 59 N.W. 2d 825 (1953)	4

PAGE

Commonwealth ex rel. Harry v. *Eastridge,* 374 Pa. 172, 97 A. 2d 350 (1953) 4

Griggs v. *Barnes,* 257 Ala. 21, 57 So. 2d 61 (1952) 4

Hardcastle v. *Hardcastle,* 118 Utah 192, 221 P. 2d 883 (1950) 4

Harper v. *Tipple,* 21 Ariz. 41, 184 Pac. 1005 (1919) 4

Horn v. *Horn,* 5 Ill. App. 2d 346, 125 N.E. 2d 539 (1955) 4

Lanigne v. *Family and Children's Society of Elizabeth,* 18 N.J. Super. 559, 87 A. 2d 739 (1952) 4

Lewis v. *Spaulding,* 193 Misc. 66, 73; 85 N.Y.S. 2d 682 (Sup. Ct., Albany County, 1948) 6

Marcum v. *Marcum,* 265 P. 2d 723 (Okla., 1954) .. 4

Meyer v. *Nebraska,* 262 U.S. 390 (1923) 4, 5

Parks v. *Crowley,* 221 Ark. 340, 253 S.W. 2d 561 (1953) 4

People ex rel. Kropp v. *Shepsky,* 305 N.Y. 465, 113 N.E. 2d 801 (1953) 4

Portnoy v. *Strasser,* 303 N.Y. 539, 104 N.E. 2d 895 (1952) 4

Prince v. *Massachusetts,* 321 U.S. 158 (1944) .. 5

Reynolds v. *Davidow,* 200 Miss. 480, 27 So. 2d 691 (1946) 4

Rodale v. *Grimes,* 211 Ga. 674, 87 S.E. 2d 857 (1955) 4

Shelley v. *Kraemer,* 334 U.S. 1 (1948) 5

Sklaroff v. *Skeadas,* 84 R.I. 1, 120 A. 2d 694, *cert. den.* 305 U.S. 988 (1956) 4

Society of Sisters, 268 U.S. 510 (1925) 4, 5

PAGE

Starnes v. *Jost*, 228 S.W. 2d 563 (Tex. C.A. 1950) 4
State ex rel. Martin v. *Garza*, 217 La. 532, 46 So. 2d 760 (1959) 4
Stewart v. *Stewart*, 31 Cal. 2d 447, 260 P. 2d 44 (1953) 4
Stinson v. *Meegan*, 318 Mass. 459, 62 N.E. 2d 113 (1945) 4
Stout v. *Stout*, 166 Kan. 459, 201 P. 2d 637 (1949) 4
Ward, Ex Parte, 39 Wash. 2d 894, 239 P. 2d 560 (1952) 4
West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943) 6
Wright v. *People*, 131 Colo. 92, 279 P. 2d 676 (1955) 4

OTHER AUTHORITY CITED

United States Constitution:

First Amendment 3, 5, 6
Fourteenth Amendment 2, 3, 5, 6

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend,

Petitioner

—v.—

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife,

Respondents.

BRIEF OF *AMICUS CURIAE*

Interest of *Amicus*

The Board of Christian Social Concerns is an agency of the New York Annual Conference of The Methodist Church.

It is our view that fundamental to the Judeo-Christian tradition is the belief that God has made the family the basic unit of society. While the instant case is concerned with conflicting claims of custody of a single child, the decision of the Court below could have far reaching effects on the family relationship, inconsistent with the guarantees implicit in the Constitution.

The purpose of this brief is to voice the concern of all families who look to the religious community to speak out in support of the sanctity of the family unit.

Statement

The instant case arises out of a claim to the custody of an eight year old boy, Mark Painter, by the maternal grandparents of the child, Dwight and Margaret Bannister, Respondents in this Court.

The Petitioner in this Court, Harold W. Painter, initiated a proceeding in the District Court of Story County, Iowa for a Writ of Habeas Corpus directing that the infant be delivered into his permanent custody. Such an order was issued by that Court.

On appeal to the Supreme Court of Iowa, that Court reversed and remanded with instruction that judgment be entered consistent with its opinion awarding custody to the grandparents.

Petitioner has applied to this Court for a Writ of Certiorari directed to the Supreme Court of Iowa.

This brief is written in support of the Petition for Certiorari.

Questions Presented

1. Whether the sanctity of the family may be abridged by a state, in ordering that custody of an infant child be taken from its concededly fit parent, which parent has not abandoned or surrendered custody of the infant, consistent with the guarantee of the due process clause of the Fourteenth Amendment.

2. Whether a state, consistent with the guarantees of the First and the due process clause of the Fourteenth Amendments, may violate family sanctity by ordering custody of an infant to be transferred from a fit parent who has not surrendered or abandoned such infant, because of the political and religious beliefs of such parent.

Reason for Granting Writ

Important questions of federal law are raised by the decision of the Court below, which questions have not been but should be decided by this Court.

The decision of the Court below could have far reaching effects on the family relationship, inconsistent with the guarantees implicit in the Constitution. The sanctity of the family as we have come to know it under our Anglo-American law could be drastically altered.

POINT I

A state may not abridge the sanctity of the family by ordering the custody of an infant child to be taken from its concededly fit parent, which parent has not abandoned or surrendered custody of the infant, consistent with the guarantee of the due process clause of the Fourteenth Amendment.

A universally accepted principle of law is to the effect that the natural parent has a presumptive right to the custody of his child in the absence of a showing

of abandonment and unfitness. *People ex rel. Kropp* v. *Shepsky,* 305 N.Y. 465, 113 N.E. 2d 801 (1953); *Stout* v. *Stout,* 166 Kan. 459, 201 P. 2d 637 (1949); *Blow* v. *Lottman,* 75 S.D. 127, 59 N.W. 2d 825 (1953); *Stinson* v. *Meegan,* 318 Mass. 459, 62 N.E. 2d 113 (1945); *Parks* v. *Crowley,* 221 Ark. 340, 253 S.W. 2d 561 (1953); *State ex rel. Martin* v. *Garza,* 217 La. 532, 46 So. 2d 760 (1959); *Rodale* v. *Grimes,* 211 Ga. 674, 87 S.E. 2d 857 (1955); *Griggs* v. *Barnes,* 257 Ala. 21, 57 So. 2d 61 (1952); *Commonwealth ex rel. Harry* v. *Eastridge,* 374 Pa. 172, 97 A. 2d 350 (1953); *Harper* v. *Tipple,* 21 Ariz. 41, 184 Pac. 1005 (1919); *Hardcastle* v. *Hardcastle,* 118 Utah 192, 221 P. 2d 883 (1950); *Ex Parte Ward,* 39 Wash. 2d 894, 239 P. 2d 560 (1952); *Marcum* v. *Marcum,* 265 P. 2d 723 (Okla., 1954); *Stewart* v. *Stewart,* 31 Cal. 2d 447, 260 P. 2d 44 (1953); *Wright* v. *People,* 131 Colo. 92, 279 P. 2d 676 (1955); *Horn* v. *Horn,* 5 Ill. App. 2d 346, 125 N.E. 2d 539 (1955); *Lanigne* v. *Family and Children's Society of Elizabeth,* 18 N.J. Super. 559, 87 A. 2d 739 (1952); *Starnes* v. *Jost,* 228 S.W. 2d 563 (Tex. C.A. 1950); *Reynolds* v. *Davidow,* 200 Miss. 480, 27 So. 2d 691 (1946). See particularly, *Portnoy* v. *Strasser,* 303 N.Y. 539, 104 N.E. 2d 895 (1952); *Sklaroff* v. *Skeadas,* 84 R.I. 1, 120 A. 2d 694, *cert. den.* 305 U.S. 988 (1956), where under factual situations more far-reaching than here present, State Courts have upheld the rights of the natural parent. See also, the decision of the Circuit Court of Appeals for the District of Columbia, *Bell* v. *Leonard,* 251 Fed. 2d 890 (1958).

The right of a state, acting through the Court as *parens patriae* is not without limitation. *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). See also, *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Nor is there

any question but that the action of a Court and its judicial officers is within the reach of the Fourteenth Amendment. *Shelley* v. *Kraemer* 334 U.S. 1 (1948).

To breach traditional concepts of law and culture because the Court below concludes that respondents may furnish the infant "with a stable, dependable, conventional, middle-class, middlewest background", whereas the kind of life the infant would be exposed to in petitioner's household would be "unstable, unconventional, arty, Bohemian and probably intellectually stimulating" exceeds the right of a state Court acting as *parens patriae*, and falls within the prohibitions of the Fourteenth Amendment. *Meyer* v. *Nebraska, supra,* 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters, supra,* 268 U.S. 510 (1925); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944).

POINT II

A state may not violate family sanctity by ordering custody of an infant to be transferred from a fit parent who has not surrendered or abandoned such infant, because of the political or religious beliefs of such parent, consistent with the guarantees of the First, and due process clause of the Fourteenth, Amendments.

"Mr. Painter is either an agnostic or atheist and has no concern for formal religious training. He has read of lot of Zen Buddhism and 'has been very much influenced by it.' Mrs. Painter is Roman Catholic. They plan to send Mark to a

Congregational Church near the Catholic Church, on an irregular schedule.

"He is a political liberal and got into difficulty in a job at the University of Washington for his support of the activities of the American Civil Liberties Union in the university news bulletin." (Opinion of the Iowa Supreme Court, found in petitioner's brief, appendix B at p. 7a.)

To breach the family relationship because the parent is "either an agnostic or atheist and has no concern for formal religious training"; because "he is a political liberal"; because of his "support of the activities of the American Civil Liberties Union" is a denial of the First and Fourteenth Amendments rights that by now should be beyond serious challenge in this Court.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943).

"The priceless heritage of our society is the unrestricted right of each member to think as he will." *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 393 (1950).

"Fundamental is the right of the parent to rear his child in a particular religious faith, or to rear him as a non-believer if he so elects." *Lewis* v. *Spaulding,* 193 Misc. 66, 73; 85 N.Y.S. 2d 682, 690 (Sup. Ct., Albany County, 1948).

To the extent that the conclusion of the Court below is influenced by the stated religious and political beliefs, its holding would be but a form of a denial of those federally guaranteed rights in a manner that is cruel and unusual to the extreme, by sanctioning deprivation of a father's right to the custody of his son, and the son's essential right to the companionship of his father.

CONCLUSION

The Writ of Certiorari should be issued.

Respectfully submitted,

RANDOLPH J. SEIFERT
Attorney for the Board of Christian Social Concerns, New York Annual Conference of The Methodist Church
11 East 44th Street
New York, New York 10017

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 25 1966
JOHN F. DAVIS, CLERK

No. 518.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

MARK WENDELL PAINTER, a Minor, by Harold W. Painter,
His Father and Next Friend,
Petitioner,

v.

DWIGHT BANNISTER and MARGARET BANNISTER,
Husband and Wife,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Iowa.

RESPONDENTS' BRIEF IN OPPOSITION.

JOHN L. BUTLER,
JACK A. HALL,
Eldora, Iowa 50627,
Attorneys for Respondents.

Of Counsel:
LUNDY, BUTLER, WILSON & HALL,
Eldora, Iowa.

October, 1966.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

TABLE OF CONTENTS.

	Page
Questions Presented	1
Statement	3
Failure to Timely Raise Constitutional Questions	18
Reasons for Denying the Writ	19
Response to Amicus Curiae Briefs	36
Conclusion	38

INDEX TO CITATIONS.

Cases:

Altmiller v. Forsman, 76 Idaho 521, 285 P. 2d 1064 .. 25
Armstrong v. Green, 260 Ala. 39, 68 So. 2d 834 25
Armstrong v. Manzo, 380 U. S. 545 .....20, 29

Bailey v. Mars, 183 Conn. 593, 87 A. 2d 388 25
Baram v. Schwartz, 151 Conn. 315, 197 A. 2d 334 25
Beach v. Leroy, 228 Ind. 122, 89 N. E. 2d 912 25
Bobroff v. Levin, 350 Ill. App. 501, 133 N. E. 2d 177 25
Brown v. Beachler, 224 Ind. 477, 68 N. E. 2d 915 25

Carrere v. Prunty, 133 N. W. 2d 692 .....23, 26, 28
Childers v. Childers, 136 N. W. 2d 268 23
Clifford v. Woodford, 83 Ariz. 257, 320 P. 2d 452 .. 28
Commonwealth v. Powers, 206 Pa. S. 415, 212 A. 2d 922 25
Commonwealth v. Reed, 202 Pa. S. 558, 198 A. 2d 344 25

Dixon v. Duffy, 342 U. S. 33 36
Drumb v. Keen, 47 Iowa 435 23
Durley v. Mayo, 351 U. S. 277 36
Durst v. Roach, 245 Iowa 342, 62 N. W. 2d 159 23

Ellison v. Platts, 236 Iowa 1211, 286 N. W. 413 23
Ex Parte Burrus, 136 U. S. 586 21

Farbes v. Warren, 184 Miss. 526, 186 So. 325 25
Fielding v. Highsmith, 152 Fla. 837, 13 So. 2d 208 .. 25
Finken v. Porter, 246 Iowa 1345, 72 N. W. 2d 445 23

Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 556, 158 N. E. 2d 613 25
Glass v. Bailey, 233 Ind. 266, 118 N. E. 2d 800 25
Griswold v. Connecticut, 381 U. S. 479 22

Halstead v. Halstead, 144 N. W. 2d 861 24
Hamilton v. Sourjohn, 332 Ill. App. 279, 75 N. E. 2d 42 25
Hanson v. Denckla, Del. & Fla., 357 U. S. 235 18
Henry v. James, 222 Ark. 89, 257 S. W. 2d 285 25
Herr v. Lazor, 238 Iowa 518, 28 N. W. 2d 11 23
Hitchcock v. Thomason, Mun. Ct. of Appeals for D. C., 148 A. 2d 458 25

In re Estate of Drumheller, 252 Iowa 1378, 110 N. W. 2d 833 38
In re J....., ... Mo. ..., 357 S. W. 2d 197 25
In re Mathers, 371 Mich. 516, 124 N. W. 2d 878 24

Jacobs v. City of Chariton, 245 Iowa 1378, 65 N. W. 2d 561 18
Jensen v. Sorenson, 211 Iowa 354, 233 N. W. 317 ... 23
Joiner v. Knieriem, 243 Iowa 470, 52 N. W. 2d 21 ... 23

King v. Shrum, 244 S. W. 2d 720 25
Kouris v. Lunn, 136 N. W. 2d 502 .....23, 24

Laub v. Caltobelotta, 33 Misc. 2d 397, 219 N. Y. S. 2d 363 28
Long v. McInnich, 264 P. 2d 767 25

May v. Anderson, 345 U. S. 528 20
Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310 23
Meyer v. Nebraska, 262 U. S. 390 21
Morris v. Jackson, 66 Wyo. 369, 212 P. 2d 78 25
McKay v. Mitzel, 137 N. W. 2d 792 25
McKay v. Ruffcorn, 247 Iowa 195, 73 N. W. 2d 78 ... 23

Ohio v. Popovici, 280 U. S. 379 22
Osburn v. Roberts, 197 Okla. 206, 169 P. 2d 293 25

Paul v. Peniston, 235 La. 579, 105 S. 2d 228 25
Paulson v. Windelow, 236 Iowa 1011, 20 N. W. 2d 470 23
Pelton v. Halverson, 240 Iowa 184, 35 N. W. 2d 759.. 23
Pierce v. Society of Sisters, 268 U. S. 510 21
Prince v. Massachusetts, 321 U. S. 158 20

Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892 28
Root v. Allen, 151 Colo. 311, 377 P. 2d 117 25
Russell v. Russell, 208 Okla. 41, 253 P. 2d 136 25

Scott v. Ashcroft, 342 Ill. App. 33, 95 N. E. 2d 122 ... 25
Selmen v. Phillips, 384 U. S. 210 20
Shamenek v. Allen, 179 Pa. S. 169, 116 A. 2d 336 ... 25
Skinner v. Oklahoma, 316 U. S. 535 20
Smith v. Smith, 188 Tenn. 430, 220 S. W. 2d 627 25
Stout v. Massie, 140 W. Va. 731, 88 S. E. 2d 51 25
Stubbs v. Hammond, 135 N. W. 2d 540 29

Taylor v. Taylor, 182 Okla. 11, 75 P. 2d 1132 25
Testerman v. Frederich, 323 S. W. 2d 522 25
Thein v. Squires, 250 Iowa 1194, 97 N. W. 2d 156 24
Thumma v. Hartsook, 239 Md. 38, 210 A. 2d 151 25
Trenton v. Christ, 216 Md. 418, 140 A. 2d 660 25
Trotter v. Pollan, 311 S. W. 2d 723 25

Wall v. Hardee, 240 N. C. 465, 82 S. E. 2d 370 25
Wehrman v. Farmers & Merch. Sav. Bk., 221 Iowa 249, 259 N. W. 564 18
Werling v. Heggen, 208 Iowa 908, 225 N. W. 952 23

Young v. Ragen, 337 U. S. 235 36

Constitution and Statutes:

United States Constitution—
First Amendment 2
Fourteenth Amendment 2
Hawaii Sess. Laws, Act 83, § 1 (2) 26
Iowa Rule of Civil Procedure, 344 (f) (15) 23

Miscellaneous:

ABA Section of Family Law, 1963 Proceedings, P. 38 26
Adoption of a Minor, 343 Mass. 292, 178 N. E. 2d 264 25
15 A. L. R. 2d 432, 435 27
39 A. L. R. 2d 258, 264 29
66 A. L. R. 2d 1410, 1413-1416 34
25 Am. Jur., Habeas Corpus, § 80, p. 205 27
27 Am. Jur., Infants, § 108 27
15 C. J. S., Conflict of Laws, § 14 (d), p. 911 38
67 C. J. S., Parent and Child, § 4, p. 630 38
67 C. J. S., Parent and Child, § 11 27
Comments of Harry M. Fain, 1963 Chairman of Committee on Child Custody of the Section of Family Law appearing in ABA Section of Family Law, 1963 Proceedings 27
Des Moines Register, February 20, 1966 16
Foster and Freed, "Child Custody", 39 N. Y. Univ. L. Rev. 423 27
Goodrich, Conflict of Laws, Section 136, p. 272 38
79 Harvard L. Rev. 1710, 1715 37
Madden, Persons and Domestic Relations, Hornbook Series (1931) 26
Minutes of Board of Directors of the American Civil Liberties Union of February 28, 1966 37
Peck, Domestic Relations (1930), pp. 371-372 27
Section of Family Law of the American Bar Association 26
Webster's Third New International Dictionary 30

No. 518.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

MARK WENDELL PAINTER, a Minor, by Harold W. Painter,
His Father and Next Friend,
Petitioner,

v.

DWIGHT BANNISTER and MARGARET BANNISTER,
Husband and Wife,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Iowa.

RESPONDENTS' BRIEF IN OPPOSITION.

Respondents pray that Petitioner's petition for writ of certiorari be denied.

QUESTIONS PRESENTED.

Respondents are dissatisfied with Petitioner's "Questions Presented", and submit the following in substitution.

1. **Due Process Clause of the Fourteenth Amendment.**

Was this provision violated by the Supreme Court of Iowa by its decision awarding legal custody of a child to his grandparents who have had actual custody for such a period of time and under such circumstances that it would be detrimental to the child's emotional health to return him to his biological father, even though the father did not legally abandon the child and even though the father is not morally unfit?

2. **Due Process Clause of the Fourteenth Amendment and the First Amendment.**

Were these provisions violated by the Supreme Court of Iowa settling the custody of a minor child with his grandparents and basing its decision upon the child's best interests, when the Supreme Court of Iowa incidentally took note of wide differences in the religious views, philosophies of life and modes of living between the biological father and the grandparents in considering the adjustments the child would necessarily be required to make if moved?

3. **Due Process Clause of the Fourteenth Amendment.**

Was this provision violated by the Supreme Court of Iowa in awarding legal custody of a minor child to his grandparents upon the undisputed testimony of a competent child psychologist, three public school teachers and a minister, and upon other evidence; that it would be highly detrimental to the child's emotional health to require him to be moved from his present surroundings, particularly in the absence of any offer of evidence to the contrary?

STATEMENT.

Mr. and Mrs. Bannister, age 60 at the time of trial (R. 555, 476), live on an 80-acre farm between Ames and Gilbert, Iowa, but do not farm the land themselves. Their home is well-kept, comfortable and spacious (Court's Ex. 2, p. 4, par. 4, R. 572; and Exs. 48, 49, 50, R. 481-482), and their assets insure them a comfortable living (R. 493-494, 555). Both are college graduates, as were their four daughters (R. 476, 555). Mr. Bannister has owned and published various newspapers, and was in recent years an associate professor at Iowa State University at Ames (R. 555, 557). Both are regarded excellently in the community of Gilbert,[1] where Mr. Bannister has been a school board member and Sunday School teacher at the Congregational Church (R. 534, 385, 529, 385). When she finished college, their daughter Jeanne went to Anchorage, Alaska, as society editor for the Anchorage Times. There she met Harold Painter and married him April 6, 1957 (R. 478).

Mr. Painter, age 34 at the time of trial, was born and raised in the San Francisco area. At age 2½ he was placed by his parents in the foster home of Mr. and Mrs. Leo McNelly (R. 23), because neither his mother nor his father were allowed to have him (R. 177). The parents were later divorced (R. 235). Harold flunked out of one

---

[1] Dr. Glenn R. Hawkes, a psychologist whose testimony will be given in more detail later, said the Bannisters are a very stable couple and have a very good marriage relationship based on respect and affection (R. 435). A Story County, Iowa, Social Welfare Department report prepared at the request of the trial court stated: "Dwight and Margaret Bannister are delightful as individuals and as a couple. This is no doubt due to their fine mental health. . . . They are very considerate. They relate on a sincere and meaningful level. They might be described as 'real' people. . . . Both have a great deal of energy and zest for living. . . . Mr. and Mrs. Bannister are intelligent and well educated. They are people who have continued to think and to grow intellectually" (Court's Ex. 2, p. 2, pars. 2-10, R. 572).

school ("I just felt the academic subjects were an imposition and unnecessary for what I had in mind.") and later out of a second after he had completed one year of high school (R. 25, 134). At "loose ends" (R. 235) at age 17, he joined the Navy and went to Hawaii (R. 28, 29). Later he attended a two-year college but testified: "I did not accept my diploma . . . (because) there was no reason for it" (R. 31-32). He enrolled in another college but quit because he did not want to take the required courses, testifying: "I was quite disappointed at the level at which they were taught and actually quite bored with them" (R. 31-34).

In the ten years between the time he left college and the time of trial, Mr. Painter worked for six newspapers in six different cities (R. 34, 35, 42, 43, 46, 62, 81-83). He left one job because of dissatisfaction with pay (R. 35), one for less pay because he wanted a job "that would be just enough to get by and require as little work as possible (R. 42), one because he was asked to leave (R. 43), and one because he "disliked it very much" (R. 44-46). During the same period he worked for the publications department of Washington State University but was asked to leave (R. 46),[2] did free lance writing at home during a period of unemployment (R. 50), and worked as a graphic designer (R. 60). At the time of trial he worked at the Oakland Tribune, but was dissatisfied with his job and contemplated moving to Berkeley, California (R. 128, 142-149).

---

[2] Prof. Henry Grosshand, Mr. Painter's supervisor at Washington State University, testified: "He had a belief that in almost any area he was qualified to make his own decisions. . . . I think at times what I would call self-confidence bordered on arrogance. It was very difficult to present to him alternatives to his own way of approaching things. He did not take kindly to advice of almost any kind. . . . He believed his opinions about any aspect of publishing were indisputable even if he possessed little or no training or experience in the particular subject" (R. 344, 345, 348).

Mark was born in 1958—his sister Janet in 1959 (R. 3, 42). After being released from Washington State University in October of 1962, Mr. Painter had about eight job offers but turned them all down (R. 51). To support the family his wife, Jeanne, took a full-time job with a newspaper at Moscow, Idaho. She took the children daily to nursery school at Moscow while Mr. Painter stayed home and wrote, cooked meals, washed dishes and did the housework. On December 6, 1962, Mark was left home because of illness. Jeanne and Janet, then age three, were on their way to Moscow when their automobile skidded and collided with a school bus. Jeanne was killed instantly, and Janet died four days later (R. 47-48). Mr. Painter testified there were two funerals for Jeanne: The first was in his basement with no one but himself present. The second was at a church at Pullman which he said was for the gratification of her friends, "and that was the only purpose as far as I was concerned." At the church funeral he wore a sports shirt and sweater with no necktie (R. 54, 142). Jeanne and Janet were buried in the Bannister family plot at Ottumwa, Iowa; Mr. Painter did not accompany their bodies to Iowa for the burials (R. 54, 55).

Continuing unemployed after his wife's death, Mr. Painter consumed her estate of $4300-$4400, which included stocks given to Jeanne by the Bannisters with the hope they would be used for the children's education,[3] and also included $250.00 and $343.26 belonging to Janet and Mark, respectively, of which Mr. Painter was trustee (R. 57-58, 130, 479). He used the money to buy $800-$1100 worth of camera equipment, a car, a 24-foot sail

[3] Mr. Painter's foster mother, Mrs. McNelly, wrote the Bannisters in August of 1963: "I know how Jean felt about Hal spending her money because she told me and I'm sure she would have wanted Hal to save most of it for Mark's education and I told him so. But he turned deaf ears . . ." (Defs. Dep. Ex. 1, p. 3; R. 375).

boat costing $3500, and for living expenses (R. 58-60). He bought the boat intending to sell it at a profit, but sold it at a loss (R. 129). He gave some of his camera equipment away, sold some for $180, and returned some to the seller to terminate the contract (R. 136). He was in an accident and wrecked the car he purchased, bought another car which went to pieces in two days, and then bought a third. Not having had any employment for over seven months (except a job from which he earned a total of $150), and having used all the money from Jeanne's estate and the children's trust accounts, he was in financial straits so took a job with the Contra Costa Times in June or July of 1963 (R. 75-76).[4]

Most of the evidence regarding Mr. Painter's religious beliefs and practices was offered by him. No objections were interposed to any questions asked by Respondents dealing with those matters. And, as will be pointed out later, no suggestion was made in the trial court or in the Supreme Court of Iowa that such considerations were improper for constitutional or other reasons, until the petition for rehearing was filed after the opinion of the Supreme Court of Iowa was handed down. The evidence introduced was this: Mr. Painter is agnostic (R. 134), belongs to no church or religious group (R. 53), does not accept the Christ Diety (R. 133), says he has had no evidence presented to him that there is an infinite God (R. 149), and generally left it to Jeanne to take Mark to the Congregational Sunday School, which she did regularly (R. 53). After Mr. Painter and Mark left Pullman

[4] The record is replete with examples too lengthy to detail of Mr. Painter's inability to handle money. Mrs. Betts, his natural mother, and Marylyn, his present wife, testified he is impractical about money (R. 173, 237, 238, 245). Both his first and second wives handled the family funds and check writing (R. 136, 162, 173, 274, 331). Jeanne had commented in letters to her parents about his visionary ideas, lack of financial responsibility, and lack of responsibility toward small children (R. 500-502).

shortly after Jeanne's death, Mark was never taken to Sunday School while his father had his custody (R. 133). Mr. Painter testified he has read a lot of Zen Buddhism and has been very much influenced by it (R. 133-134). The present Mrs. Painter is Catholic. If they had Mark's custody, they would send him to a Congregational Church and Sunday School but, testified Mr. Painter: "In all honesty, I would not insist on Mark going to church every Sunday" (R. 116, 151).

Throughout Mr. Painter's testimony there were references to his temper. For instance, he said he "blew his stack" at his wife (R. 144) and, referring to the Bannisters, said: "I wish I would have strangled them both—I wish I had" (R. 145).

After the accident Mrs. Betts and Mrs. McNelly stayed with Mr. Painter and Mark as long as they remained in Pullman (R. 264). In February of 1963 Mark stayed in McNellys' trailer for three weeks (R. 141), then Mr. Painter rented a house in Glen Ellyn for three and a half months for he and Mark during which time Mark would sometimes stay with McNellys (R. 59-60, 141). He then moved to Walnut Creek into a very nice apartment with a swimming pool which had a sign on it saying children would be allowed to visit Sundays (R. 481), and he sent Mark to live with McNellys, who were just leaving on a one or two month fishing trip (R. 63, 141-142). Mr. Painter did not pay the McNellys anything for Mark's keep (R. 66, 368), but they thought he should "so he would understand there was a responsibility that a father had to the child" (R. 206-207). They mentioned it to him (Defs. Dep. Ex. 1, pp. 1-2, R. 375), and Mr. Painter responded by calling the Bannisters and asking them to take Mark to Iowa to get him started in school (R. 67, 480). He did not tell the McNellys that Mark was going to Iowa until the Bannisters arrived to get him, notwithstanding that

Mark was then living with McNellys. Naturally McNellys were surprised[5] (R. 194, 207). Mr. Painter testified he thought Mark would be better off with the Bannisters because they were educated, sensitive people (R. 66), and felt Mark should be in a permanent home where he could start school and not have it interrupted—that he should be settled with people who were settled (R. 63, 64).

When Mark came to Iowa in July of 1963, at age five, he would have flights of fancy and seemed incapable of distinguishing fact from fiction (R. 512, 513). Mr. Painter had been concerned about his exaggerations (R. 140). Mark also had serious behavioral problems. He was very belligerent to children who were smaller than he (R. 485) and always wanted to prove he was right. His eating habits were not good. He was aggressive toward animals; he would throw rocks at dogs which were trapped in the basement entryway and would not let them escape (R. 486). At school he would grab other children by the neck (R. 524) and once choked a little boy as hard as he could. His music teacher told of his pushing a child down the stairs, slapping another on the ear, and pulling the chair out from under another (R. 544). On the school bus he pushed a girl out of her seat into the aisle, and twice the bus driver had to stop the bus, go back and forcibly set him down in his seat (R. 385-386). The other children did not want to play with him because he did not know how to play (R. 540), and would avoid him on the bus because otherwise he would attack them (R. 398).[6] Mr.

---

[5] Mrs. McNelly wrote the Bannisters: "I can't believe a little money could make such a difference in a person, or maybe it brings out the real person," and added that she hoped he would change soon and be a good father to Mark (Defs'. Dep. Ex. 1, pp. 1, 5, R. 375).

[6] When he misbehaved toward other children, his music teacher testified, he was not just playing, but was upset (R. 548). The bus driver said he was very aggressive and completely undisciplined (R. 385). The kindergarten teacher, who

Painter testified about deportment trouble Mark was having at Pullman (R. 52), and that when fighting he had to be stopped from hurting other children (R. 68). Yet when Mrs. Bannister tried to discuss these problems with Mr. Painter on the telephone, she was rebuffed (R. 514).

Mark began kindergarten after coming to Iowa. The trial of this case occurred after his completion of first grade. He is now in third grade at the Gilbert school. His behavior began improving about Christmas time of his kindergarten year (R. 486), and by the time of trial he had made a great deal of improvement (R. 544, 525, 537, 540, 386, 487). Mark's I. Q. is 120-130, which is considerably above average (R. 417). He attends Sunday School and church practically every Sunday at the Gilbert Congregational Church (R. 384, 547). The high quality of care Mark receives in the Bannister home is undisputed[7] (R. 483-484, 549, 519, 526, 487, 493).

Mr. Painter wrote Mark "once a month or whenever the spirit moved me" (R. 72). Between Christmas of 1963 and June of 1964, Mr. Painter promised on four occasions to visit Mark, but failed each time (R. 72, 77, 489, Ex. 26, p. 3). Bannisters had a letter from Painter July 14, 1964, and next heard from him Labor Day, saying he would visit them and Mark September 9. On September 9 he called saying he would be there September 16, 1964 (R. 489), at which time he did make his first visit to Iowa. Regarding that visit, he testified he "was not sure about my interest as to taking Mark back in September. . . . The same unstable situation existed that existed at the time I sent him

---

had 20 years teaching experience, said he was emotionally disturbed and acted like he did not know how to behave (R. 523-524). Another, who had taught over eight years, said he had the worst emotional problems she had ever seen (R. 540).

[7] At the trial Mr. Painter testified: "I think Mark has had a good home with the Bannisters . . . I also recognized the Bannisters were very good people" (R. 140).

to Ames so I was apprehensive about this disrupting of him" (R. 83-84). He did not try to take Mark with him at that time (R. 507). He married Marylyn Hanson November 28, 1964 (R. 23), but did not seek Mark's return until June of 1965.

The marriage to Miss Hanson terminated a long period of uncertainty about Painter's remarriage plans. He had considered marrying a Helen Boutell in November of 1963 (R. 144). But on April 13, 1964, he wrote the Bannisters: "The marriage, I'm afraid, is off. After a certain period of fruitful negotiations, I was told that she, at age 37, is not ready to settle down—plus a certain incompatability began to express itself. So the outcome seems perfectly reasonable and 'acceptable.' As a $2-a-crack fortune teller once told me, I'm apt to put my romantic interest on an ideal pedestal of my own making and then be completely frustrated (when) my ideal is violated." In June of 1964 he called the Bannisters saying he was going to marry Marylyn Hanson in July (R. 488-489). That date was changed several times; Painter testified: "I became very pushy. I wanted to get married right away and settle things right away and Marylyn got nervous about it." Their marriage plans remained uncertain until November (R. 143).

When Bannisters took Mark in July of 1963, Mr. Bannister suggested to Mr. Painter that he send $50 a month for Mark's support. Painter turned away and said nothing (R. 564). Bannisters later repeated the suggestion in a letter (R. 74). During the more than two years which Mark was in Iowa before the trial, Mr. Painter sent a total of $135, plus money for a Christmas present (R. 488).[8]

[8] Mrs. McNelly wrote that Painter did not want to spend one cent on Mark, that he was "using" the Bannisters so he could spend his money on himself, and that "There are laws to protect youngsters and they should be used in such cases" (Defs'. Dep. Ex. 1, R. 375).

In June of 1965 the Painters and Bannisters had a discussion in the Bannister home, ending with Mr. Bannister saying he would not permit the Painters to take Mark (R. 90-102). The next day the Painters, although having their California-licensed car with them, rented an Iowa car with Iowa plates so as not to be recognized and went to Mark's school. Mr. Painter testified: "We cruised, and just observed the school, looked for sentries, which we think we found one." They saw Mark on the playground and told the teacher they were going to take him to California. When the teacher put her hands on Mark they removed them, grabbed the boy and ran for the car with Mrs. Painter blocking the teacher who was frantically chasing them. The superintendent intervened in time, and Mark stayed at school. He was shocked, stunned, frightened and crying, and spent the rest of the day just staring into space (R. 103-104, 131, 133, 392, 534, 542). This habeas corpus action followed.

Several witnesses related comments which Mark had made to them about Mr. Painter and the Bannisters. He told Mrs. Felber, a neighbor: "We are a family now" (R. 554). He told Mrs. Mumm, a teacher, that his father was always going to do things for him or come to visit him, and would forget (R. 546). He told Mrs. Sherwood, a teacher: "My father wants me to live with him, but I don't want to go" (R. 538). He told the Story County Welfare Worker that he definitely wants to stay with the Bannisters (Court's Ex. 2, p. 2, R. 572), and told Dr. Hawkes, the child psychologist, the same thing (R. 424, 425).

Mark's three teachers and his minister all testified that moving Mark from the Bannister home would have a serious psychological effect on him (R. 528, 536, 539, 546-547). The Story County, Iowa, Social Welfare Department also recommended that he remain in the Bannister home.

Glenn R. Hawkes is a child psychologist and, at the time of trial, had been head of the Department of Child Development at Iowa State University for 12 years.[9]

He spent 25 hours evaluating Mark and the Bannisters (R. 408-411). Following is a synopsis of his testimony:

> Mark is now in his latency period of development, which is the very critical stage where he is developing most of his concepts, his attitudes about himself and maleness, and his attitudes about the world (R. 415, 419-430).
>
> When he came to Iowa from California, Mark was aggressive, frightened, had difficulty sleeping, and had not internalized many controls. He was anxious and unsettled (R. 428). He remembers, before coming to live with the Bannisters, of wondering what was going to happen to him, who was in charge of him, and who he could turn to (R. 420-421). He remembers wondering where his father was, and

[9] Dr. Hawkes has a bachelor's and master's degree in psychology, and doctor's degree in child psychology from Cornell University. He has lectured and conducted workshops at a number of American Universities, has written some 40 research articles in professional journals, is co-author of the book, "Behavior in Child Development From Five to Twelve," and of another book on the educationally disadvantaged child. He belongs to a number of professional associations, and is a past president of the National Association for Education of Young Children.

Dr. Hawkes was on the staff of the 1960 White House Conference on Children and Youth, was a consultant with the Ford Foundation in India, has been a consultant for several U. S. Government agencies and the United Nations. He is an educational consultant with the national project "Head Start". For four and a half years he served as a psychologist in the Armed Forces.

He is consulting or has consulted with the Iowa Children's Home Society, which is a foster home program, the Elizabeth McCormick Memorial Fund in Chicago, which does child research, the Toledo Welfare Agency, Toledo, Ohio, the welfare agency at Fort Worth, Texas, and other agencies.

For a number of years he has been a practicing child psychologist on a private basis (R. 404, 408).

being frightened because he was not there (R. 423). He remembers being yelled at and someone being angry with him, and thinks it was his father (R. 424-425).

A father figure is important in a child's development because he typifies maleness for the child (R. 427). Before coming to the Bannisters, Mark was confused about the father figure. He was not used to having one because Mr. Painter and Mr. McNelly shared what semblance of a father figure there was (R. 427-428). The father image was very tarnished, if it existed at all (R. 463). He is very confused about what to call Mr. Painter, and vacillates between calling him "my father", "Hal" and "that man" (R. 425). He felt he could not depend on Mr. Painter (R. 425, 474-475). He remembers very little about his biological mother and sister (R. 423).

Since coming to Iowa, Mark is making great progress toward emotional adjustment (R. 415). He does have some anxieties which must be suppressed materially (R. 415), however these can be faced in a healthy situation (R. 415). He has quite a lot of aggression but it is under control (R. 420).

Mark has spent much time since coming with the Bannisters in determining who he is and where he fits into his environment. This is normal for a child between ages five and seven (R. 430). He sees his present family as a cooperative unit, and sees a place for each person in it, including himself (R. 420). He sees his grandfather as his father figure and his grandmother as his mother figure (R. 414). He has a positive attitude toward families, and it is clear that he structures his family around the Bannisters (R. 414). He has a very warm feeling for Mr. Bannister; they have the kind of relationship that all fathers would hope they could have with their sons (R. 426). His relationship with Mrs. Bannister is

fine and respectful, and there is a warm bond of affection (R. 428).

The best way to develop a sense of responsibility in a child is for the parents to be responsible people so as to set a model by which a child builds his life (R. 416). Mark is very much concerned about good behavior, and is in the process of deciding, through adult models, what is tolerable behavior and what is not (R. 420).

Mark is very pleased with the progress he has made in school (R. 421, ll. 21-22). He is made to feel, by the adults around him, that he is an adequate person (R. 422). He has adequate contact with children his own age (R. 456).

I think Mark should be placed with the Bannisters on a permanent basis. The unsettled conditions throughout his life up to the point will cumulatively become more and more detrimental if they are allowed to persist (R. 429). It is very critical that he have a permanent arrangement. If he were four or five years younger, it would be less important, because there would be time to make up whatever deficiencies might occur because of moving from one place to another. But at this point in Mark's life it is critical that he be established in one place (R. 430).

While he has been with the Bannisters, he has been through a process of developing a concept of his role in life; it is now well established. By remaining with the Bannisters he can build on the foundation he has. He does not have to go back, pick up the pieces, and start over again (R. 431). Mark is already in a home where he has a mother and father figure. To move him from this is a rather unthinkable solution to the problem (R. 443). This is true even if you assume the best about Mr. and Mrs. Painter (R. 441).

Leaving Mark with the Bannisters is the only tenable solution (R. 443).

If the natural parents are suitable persons, a child psychologist would normally recommend that the child be with them only if the child had continuously lived with them in the past (R. 443). The biological father is necessary only for conception. The psychological father is most important. One has to earn being a father (R. 426). The persons who become the important figures in a child's life are the mother and father figures, whether there is a biological tie or not. If not, I think our whole system of adoption would be a farce (R. 443).

If Mark were disrupted at this point, if he is withdrawn from the parental figures established in his own mind and withdrawn from his present environment, he will become unsettled and anxious all over again. There would be a process of rebuilding which would be much more painful, and the chance of success would be much less likely in the second case (R. 430-432).

If Mark were moved, there is, in my opinion, a 90% chance (R. 445) that he would either develop a great deal of aggression or would withdraw (R. 432). Because of the built-up anxiety and potential aggression in Mark at the present time, he would probably become aggressive (R. 434), which would be acted out in terms of destructive tendencies. A great deal of juvenile delinquents are aggressive people because of inadequacy in their own background (R. 433). If he withdrew, he would become an inadequate person to the point that he would not be a productive member of society (R. 432, 433). It is widely recognized in psychological works that adoptions of children from six to eight years old, if there is a prior history of instability, are usually unsatisfactory (R. 447).

> I am appalled at the tremendous task Mr. Painter would have if Mark were to return to him, because he would have to build a relationship from scratch. There is essentially nothing on which to build at the present time. Mark is aware Mr. Painter is his father, but he is not very clear about what this means. In his own mind, the father figure is Mr. Bannister. I think the prognosis would not be good (R. 460-461).[10]

Petitioner's statement is extremely slanted—to the point of inaccuracy in places. For example, on page 10 the Petition discusses Painter and his wife going to the school and attempting to take Mark in June of 1965, stating: ". . . the Painters desisted rather than use anything resembling force to assert Painter's unquestionable right to return his son to his home." Mr. Painter's own testimony regarding the incident was:

> "I identified myself (to Mark's teacher) as Mark's father, and introduced her to Marylyn. I asked the teacher a few questions about how Mark was getting

---

[10] We question the propriety of Petitioner, in footnote 3 on page 17 and footnote 21 on page 35, setting out views of doctors which were not offered in evidence and were not before the Supreme Court of Iowa when it decided this case. The footnotes are intended to bolster Petitioner's assertion on page 25 that Dr. Hawkes' views "do not represent the opinion of the psychological profession generally or of other experts in the matters of child care." In rebuttal we set out from the Des Moines Register of February 20, 1966, the following quotation from Richard J. Jenkins, M. D., Professor of Child Psychiatry and Chief of Child Psychiatry Service at the State University of Iowa, Iowa City:

> "The decision before the court was whether Mark was to be removed from the home of his grandparents who are presently meeting his needs. . . . It seems clear from the evidence cited that Mark has had a difficult past, and that he showed the effects of it when the Bannisters took him. It is reported that he has made good progress. In a crucial game one does not pull a winning pitcher. The issue in this case is the welfare of the child as against the 'rights' of a father. Children are not possessions. They should never be so regarded."

> along in school. Then I handed her this card and said, 'I am acting in the law, Mrs. Sherman, I believe. We are taking Mark with us to return to California. Do you have any questions, please call my attorney.' We picked Mark up and started toward the car. The woman put her hands on Mark. I don't believe she said anything, but I said, 'Madam, please take your hands off my son. You are violating the law.' She wouldn't. Marylyn (Painter's wife) stepped in and removed her hands from Mark's arm and actually blocked the woman. I put Mark in my arms, said, 'Here we go, Bucko, the game is on,' and ran with him to the car."

At pages 12-15 of his Petition, Petitioner suggests that Respondents have displayed an improper attitude toward him. The Petitioner fails to point out the undisputed evidence that Bannisters have never been critical of Mr. Painter in Mark's presence (R. 565), and regularly wrote him and other California relatives about Mark's progress in school (R. 247). Mr. Painter promised on no less than five occasions that he would come to Iowa to visit the boy. Each time the grandparents prepared for and told Mark his father would be coming, but each time Plaintiff found reasons not to come. It was not until Mark had been in Iowa for a year and three months that Painter first visited his son (R. 489). After so many disappointments for the child, it is little wonder that Bannisters stopped talking to him about his father and about the expected visits. Painter indicated his lack of interest in Mark in ways other than failing to visit and failing to furnish support. For instance, Mrs. Bannister sent Painter some of Mark's kindergarten drawings to which he responded: "I got that pile of junk of Mark's that you sent me" (R. 514).

On P. 10 of his Petition, Petitioner notes parenthetically that he has, since the trial, taken a job at the Job Corps

camp in Pleasanton, Calif. Since he has chosen to depart from the record to give the Court this information, we believe the information with respect to his post-trial employment and housing should be accurate. He did take employment with the Job Corps at Pleasanton, but the fact is he has now left even that employment and has moved from his Walnut Creek home to Brookdale, California. The record and Petition for Writ are thus barren of any information regarding whether Petitioner is now employed, his income, if any, the housing and care which he could furnish Mark if he had his custody, the probable duration of his residence at Brookdale, the hours he works—if he is employed, whether Mrs. Painter is working, or any information whatever about the life Mark would be exposed to if sent to live with Petitioner. The only thing which remains the same as at the time of trial is that Petitioner does not stay with a job or in a community very long at a time. Mark needs stability and permanency rather than constant uprooting.

FAILURE TO TIMELY RAISE CONSTITUTIONAL QUESTIONS.

The constitutional questions presented in the Petition were not timely raised in the Iowa courts. They were first presented in the Petition for Rehearing, which is too late since there was prior opportunity to raise them. Hanson v. Denckla, Del. & Fla., 357 U. S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283. The Supreme Court of Iowa declined to consider these constitutional questions when first raised in the Petition for Rehearing, upon well-established Iowa authority that constitutional questions must be urged in the trial court and upon the original submission of the appeal to the Supreme Court. Jacobs v. City of Chariton, 245 Iowa 1378, 65 N. W. 2d 561; Wehrman v. Farmers & Merch. Sav. Bk., 221 Iowa 249, 264, 259

N. W. 564. Petitioner could have timely raised these questions in the following ways:

(1) By not himself introducing evidence concerning his religious beliefs and practices (e. g., R. 26, 27, 53), and by objecting to that which was introduced by Respondents, which he did not do (e. g., R. 133). Had he felt that such matters were irrelevant, he was required to make his record at the time the evidence was received.

(2) By raising such questions upon the original submission of this case in the Supreme Court of Iowa. Such matters were presented in Respondent's (Appellant's) brief upon the original submission and were responded to by Appellee without any claim that the Federal Constitution precluded their consideration. (E. g., Petitioner's (Appellant's) original brief in Supreme Court of Iowa, p. 27 et seq.) Also, Respondent's (Appellants) argued in their original brief in the Supreme Court of Iowa that Mark's custody should remain with them even if there was no parental relinquishment or unfitness (P. 68 of Appellants' Brief, first paragraph). Appellee disagreed with this assertion in his original brief (P. 114 et seq.), but nowhere suggested that a constitutional question was involved.

REASONS FOR DENYING THE WRIT.

1. (a) **Petitioner does not have a "family relationship" with Mark because he has not had his custody since July of 1963. United States Supreme Court cases cited by Petitioner do not consider substantive child custody questions, and have no reference to a situation where Petitioner does not have actual custody and control of the child. No federal question is presented.**

In this section, in the preliminary paragraph on P. 18, and throughout his entire petition Petitioner speaks of

the decision in this case as having destroyed an existing family relationship between him and Mark, ignoring the fact that Mark has lived with Respondents since July of 1963. In cases of this kind the question is not whether the child shall be removed from the home of the parent, but rather whether the child shall be removed from the home of the non-parents who have had his actual custody for a substantial period of time. Mark's family relationship is with the Respondents. The question is, was the Iowa court required to destroy that relationship—the only meaningful one the boy has—to satisfy what Petitioner claims are his "rights" as the natural parent.

The United States Supreme Court cases principally relied upon by Petitioner on pp. 18 and 19 of his petition have no factional similarity to the case at bar. None involve the substantive questions of change of custody. In those in which the court spoke of rights of parents, the parents had actual custody and an actual family relationship existed.

The case of Prince v. Massachusetts, 321 U. S. 158, involved the constitutionality of a child labor statute whereunder children were sought to be prohibited from distributing Jehovah Witness literature on the streets. The question revolved about the constitutional rights of the parents who were the established custodians. This was not a custody case.

Nor is Skinner v. Oklahoma, 316 U. S. 535, a custody case. There the question was whether the statute providing for vasectomy for certain criminals was constitutionally valid.

May v. Anderson, 345 U. S. 528, dealt with whether Wisconsin had constitutional jurisdiction to adjudicate a custody question, and the case noted that the issue was separated from that of the future interest of the children.

Selmen v. Phillips, 384 U. S. 210, was a memorandum decision approving Armstrong v. Manzo, 380 U. S. 545.

The latter case holds only that due process requires that a father be given reasonable notice of a hearing to adopt his child and does not involve custody.

Pierce v. Society of Sisters, 268 U. S. 510, held a statute requiring children to attend public (not private) schools unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children **under their control**. Custody was not involved.

Meyer v. Nebraska, 262 U. S. 390, held a Nebraska statute unconstitutional which prohibited the teaching of any language except English below the eighth grade. Custody was not there the issue. The opinion noted the statute did not seek to effect a valid state purpose.

To be meaningful, whatever language is cited from these cases by petitioner must be read in context. These are not child custody cases and the statements quoted are not relevant to a situation where the parent does not have custody of the child. Custody of Mark Painter must be determined by his best interests, not by abstract statements of the Court relating to family privileges, security and integrity which, as between the boy and petitioner, are non-existent.

The constitutional questions now argued were not timely presented to the Iowa courts. But in any event, no federal question is presented here to justify the granting of the writ requested. This was made clear as long ago as 1889 in Ex parte Burrus, 136 U. S. 586. There a father sought custody of his child from the grandparents. The child was taken to the grandparents' home during the mother's terminal illness. The father remarried and wanted the child returned. A writ of habeas corpus was issued by a United States District Court requiring surrender of custody to the father, and the grandfather was imprisoned for contempt when he disobeyed the writ. The

United States Supreme Court ordered the release of the grandfather, and in so doing made this pronouncement:

> "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of Congress, or any treaty of the United States **or its Constitution.**" (Emphasis added.)

The same principle is announced in Ohio v. Popovici, 280 U. S. 379.

(b) **The decision in this case was in furtherance of a valid state purpose, to-wit, protecting children within Iowa, and was consistent with a large body of Iowa child custody law.**

Petitioner also relies upon Griswold v. Connecticut, 381 U. S. 479, but in a concurring opinion in that case it was pointed out that the Connecticut law was not necessary to accomplish any permissible state policy.

Personal rights guaranteed by the Constitution are never viewed in a vacuum. They are always weighed against the public necessities involved. Even Petitioner recognizes the right of the state to remove a delinquent child from a home and institutionalize him, even though the parents are fit and are not guilty of abandonment, and the right of the state to prevent truancy or give medical treatment which the parents, perhaps for religious reasons, refuse to provide (Petition for Rehearing, filed in Supreme Court of Iowa, p. 34, footnote 1). The obvious

state purpose in the case at bar and similar cases is to protect children living within its boundaries. That such a state policy is permissible is not open to question. That the action of the state in awarding custody to non-parents who have actual custody, where the child's welfare so requires, is necessary to effectuate such a legitimate state purpose seems equally unquestionable. Petitioner's argument must, of necessity, resolve itself into a claim that it was not necessary to Mark's welfare to award him to the Bannisters in the case at bar, and thus the father's presumptive right must be enforced. This is no more than an argument of what the evidence shows. The United States Supreme Court in such a case will not weigh the evidence and base a constitutional holding on what it deems to be a preponderance. Proof of unconstitutionality must be unequivocal. Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310.

Iowa is firmly committed to the "best interest" concept. Iowa Rule of Civil Procedure 344 (f) (15) states: "In child custody cases the first and governing consideration of the courts must be the best interest of the child." The Iowa Court, while giving weight to the parental preference, has for years (contrary to Petitioner's assertion on pp. 23-24) held the child's welfare to be the paramount consideration in cases where the child has been separated from his parents and they seek to regain custody.[11] The

[11] Drumb v. Keen, 47 Iowa 435 (1877); Werling v. Heggen, 208 Iowa 908, 225 N. W. 952 (1929); Jensen v. Sorenson, 211 Iowa 354, 233 N. W. 317 (1930); Ellison v. Platts, 236 Iowa 1211, 286 N. W. 413 (1939); Paulson v. Windelow, 236 Iowa 1011, 20 N. W. 2d 470 (1945); Herr v. Lazor, 238 Iowa 518, 28 N. W. 2d 11 (1947); Pelton v. Halverson, 240 Iowa 184, 35 N. W. 2d 759; Joiner v. Knieriem, 243 Iowa 470, 52 N. W. 2d 21 (1952); Durst v. Roach, 245 Iowa 342, 62 N. W. 2d 159 (1954); Finken v. Porter, 246 Iowa 1345, 72 N. W. 2d 445 (1955); McKay v. Ruffcorn, 247 Iowa 195, 73 N. W. 2d 78 (1955); Carrere v. Prunty, 133 N. W. 2d 692 (Iowa, 1965); Childers v. Childers, 136 N. W. 2d 268 (Iowa, 1965); Kouris v. Lunn, 136 N. W. 2d 502 (Iowa, 1965).

most recent child custody decision of the Supreme Court of Iowa involving a parent and non-parent is Halstead v. Halstead, 144 N. W. 2d 861. That decision speaks of the policy considerations of Iowa in child custody cases, and we respectfully refer the Court to that opinion for a concise statement of the rationale of the Iowa Court in this type of case.

The separation of a child from his parents is often tragic. But once the separation is complete and the child adjusts to this new family, it is doubly tragic to uproot him a second time. This fact has led the Iowa Court to say a number of times that where a child has lived in a home for a period of time, has formed close attachments, and is well cared for, he should not be moved therefrom except for the most cogent reasons.[12]

(c) The United States Constitution does not require that a child living with non-parents for a substantial period of time be returned upon request to the parent if he is not morally unfit or not guilty of abandonment. A court may make such an award of custody as best serves the child's welfare.

Petitioner asks this court for a Writ of Certiorari on the basis that the Constitution of the United States prohibits the award of a child to a non-parent in a custody dispute with the natural parent, absent a finding of parental unfitness or abandonment. As stated by one Michigan jurist, such a rule would carry us back

> ". . . like the Connecticut Yankee to the darker ages of English law and customs, . . . (and make) an innocent youngster an infamous idol of the discredited rule that parental 'rights' reign over the best interest of the child."[13]

---

[12] Kouris v. Lunn, 136 N. W. 2d 502 (Iowa, 1965); Thein v. Squires, 250 Iowa 1194, 97 N. W. 2d 156 (1959).

[13] In Re Mathers, 371 Mich. 516, 124 N. W. 2d 878, 889.

The highest courts of at least 22 jurisdictions in this country have held that the welfare of the child is a consideration superior to rights of adult litigants.[14] In most of the cases cited in footnote 14 the courts have refused to uproot a youngster who has become established and is receiving good care in a home to return him to his natural parent, even though the parent may be a fit person and not guilty of abandonment. Questions of abandonment and moral fitness of the parent are frequently considered, but the "rights" of the natural parent have not been per-

---

[14] Armstrong v. Green, 260 Ala. 39, 68 So. 2d 834 (1953); Henry v. James, 222 Ark. 89, 257 S. W. 2d 285 (1963); Root v. Allen, 151 Colo. 311, 377 P. 2d 117 (1962); Baram v. Schwartz, 151 Conn. 315, 197 A. 2d 334 (1964), Bailey v. Mars, 183 Conn. 593, 87 A. 2d 388 (1952); Hitchcock v. Thomason, Mun. Ct. of Appeals for D. C., 148 A. 2d 458 (1958); Fielding v. Highsmith, 152 Fla. 837, 13 So. 2d 208 (1943); Altimiller v. Forsman, 76 Idaho 521, 285 P. 2d 1064 (1965); Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 556, 158 N. E. 2d 613 (1959); Hamilton v. Sourjohn, 332 Ill. App. 279, 75 N. E. 2d 42 (1947); Scott v. Ashcroft, 342 Ill. App. 33, 95 N. E. 2d 122 (1950); Bobroff v. Levin, 350 Ill. App. 501, 133 N. E. 2d 177 (1953); Beach v. Leroy, 228 Ind. 122, 89 N. E. 2d 912 (1950); Brown v. Beachler, 224 Ind. 477, 68 N. E. 2d 915 (1946); Glass v. Bailey, 233 Ind. 266, 118 N. E. 2d 800 (1954); Paul v. Peniston, 235 La. 579, 105 S. 2d 228 (1958); Thumma v. Hartsook, 239 Md. 38, 210 A. 2d 151; Trenton v. Christ, 216 Md. 418, 140 A. 2d 660 (1958); In re Adoption of a Minor, 343 Mass. 292, 178 N. E. 2d 264; Farbes v. Warren, 184 Miss. 526, 186 So. 325 (1939); Testerman v. Frederich, 323 S. W. 2d 522 (Kan. City Ct. of Appeals, 1959); In re J....., ... Mo. ..., 357 S. W. 2d 197 (1962); Wall v. Hardee, 240 N. C. 465, 82 S. E. 2d 370 (1954); McKay v. Mitzel, 137 N. W. 2d 792 (N. D., 1965); Osburn v. Roberts, 197 Okla. 206, 169 P. 2d 293 (1946); Russell v. Russell, 208 Okla. 41, 253 P. 2d 136 (1953); Taylor v. Taylor, 182 Okla. 11, 75 P. 2d 1132 (1938); Long v. McIninch, 264 P. 2d 767 (Okla., 1953); Commonwealth v. Reed, 202 Pa. S. 558, 198 A. 2d 344 (1964); Commonwealth v. Powers, 206 Pa. S. 415, 212 A. 2d 922 (1965); Shamenek v. Allen, 179 Pa. S. 169, 116 A. 2d 336 (1955); Smith v. Smith, 188 Tenn. 430, 220 S. W. 2d 627 (1949); King v. Shrum, 244 S. W. 2d 720 (Tex. Civ. App., 1951); Trotter v. Pollan, 311 S. W. 2d 723 (Tex. Civ. App., 1958); Stout v. Massie, 140 W. Va. 731, 88 S. E. 2d 51 (1955); Morris v. Jackson, 66 Wyo. 369, 212 P. 2d 78 (1949).

mitted to outweigh the child's welfare.[15] As noted by Petitioner at pp. 27-28 of his Petition, one state[16] has adopted the model statute proposed by the Section of Family Law of the American Bar Association, reading:

> "Custody may be awarded to persons other than the father or mother whenever such award serves the best interests of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody."[17]

This child-oriented rule does not seek to reward nor punish the adult litigants;[18] thus the reason that the child was placed with the non-parent in the first place is never controlling. Madden, Persons and Domestic Relations, Hornbook Series (1931), at pp. 375-376, notes:

> "Even though the parent's separation from the child was due to misfortune rather than to the parent's

---

[15] In footnote 7 on P. 22 Petitioner urges that the substantial number of cases where parents become divorced, the parent awarded custody later dies, and the surviving parent seeks custody from a non-parent are distinguishable from the case at bar. They are not. The law is well settled in most jurisdictions that where the divorced parent having custody dies, the "parental rights" automatically pass to the surviving parent. And Appellee says "parental rights" are the only consideration in a parent-non-parent contest, absent unfitness of the parent or abandonment. Why, then, should a court be permitted to place the welfare of the child above "parental rights" in that class of cases but be precluded from doing so in the case at bar? In both types of cases there has been a dissolution of the family. Surely Petitioner is not arguing that in the one instance the court is punishing the living parent because he is divorced, but in the case at bar the parent should be rewarded because he is not divorced. The only reasonable rationale is that these cases are decided from the standpoint of the child's interests rather than the interests of the adult litigants.

[16] Hawaii Sess. Laws, Act 83, § 1 (2), at p. 74 (1965).

[17] ABA Section of Family Law, 1963 Proceedings, p. 38.

[18] Carrere v. Prunty, 133 N. W. 2d 692 (Iowa, 1965).

fault or voluntary act, nevertheless, the child may have formed such new associations that a restoration to its parents would so greatly damage its welfare that it will be denied."

Other legal scholars have recognized and approved the awarding of custody to a non-parent in the absence of parental unfitness or abandonment if the child's best interests demands it.[19] In 67 C. J. S., Parent and Child, § 11, pp. 635-636, it is stated:

> "A parent's right to the care, custody, and control of a minor child is merely a prima facie right, and, even though the parent is a fit and proper person, his or her right to such care, custody, and control is not an absolute right, even though there has been no voluntary abandonment of the right; and it may be invaded or entirely nullified."

And 27 Am. Jur., Infants, § 108, p. 829, states:[20]

> "Wherever a controversy arises between different claimants to the custody of a child, the probable welfare of the child is the controlling consideration to which all questions of superior legal right are entirely subordinated. This test is applied in contests not only between the father and mother of the child, but also between either or both of the parents and strangers, or where neither parent of the child is a contestant."

There are many considerations in a case of this type in addition to parental fitness and abandonment. These include the length of time the child has lived with the third

---

[19] Peck, Domestic Relations (1930), pp. 371-372; Foster and Freed, "Child Custody", 39 N. Y. Univ. L. Rev. 423; Comments of Harry M. Fain, 1963 Chairman of Committee on Child Custody of the Section of Family Law appearing in ABA Section of Family Law, 1963 Proceedings; 15 A. L. R. 2d 432, 435.

[20] See also 25 Am. Jur., Habeas Corpus, § 80, p. 205.

person, the care he is receiving, the depth of his affections, ties to his present environment, the child's wishes, the child's associations with his natural parent, the effect a change of environment would have on the child's physical and mental health, the marital status and sex of the parent, the amount of time the parent could spend with the child if awarded custody, the care the parent could give the child, and the permanancy of the parent's home. If the rule Petitioner proposes were made mandatory, state courts could consider none of the above matters, but could consider only whether parental unfitness or abandonment is shown.

Courts which are so restricted have had to resort to legal fictions to circumvent the restrictions.[21] Then, too, there is the very real problem of trying to establish a satisfactory definition of "abandonment" and "unfitness." In one case, the Supreme Court of Iowa relied upon "**financial** abandonment" in awarding custody to a non-parent[22]; it seems clear that it could have likewise found Mr. Painter to have "financially abandoned" Mark had it chosen to do so. The rule for which Petitioner argues (that parental rights are absolute absent abandonment or unfitness) also results in a "tortuous wrestling"[23] with the concept of "fitness". An apt example is the case of Clifford v. Woodford, 83 Ariz. 257, 320 P. 2d 452, 454, where the Supreme Court of Arizona said:

> "If the surviving parent is shown to be unfit to assume such responsibilities **in the sense that his custody would be detrimental to the best interest and welfare of such children** then he is not entitled to their custody." (Emphasis added.)

---

[21] See, for example, Laub v. Caltobelotta, 33 Misc. 2d 397; 219 N. Y. S. 2d 363.

[22] Carrere v. Prunty, 133 N. W. 2d 692, 695 (Iowa, 1965).

[23] Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892, 898.

The Arizona Court then proceeded to award custody to the non-parents because it would be detrimental to the children to uproot them and place them with their parent. A note in 39 A. L. R. 2d 258, 264, states:

> "It may be observed that in such a connection the word 'unfit' is frequently treated as embracing matters touching the welfare of the child apart from or in addition to any question of moral character."

The Supreme Court of Iowa did, necessarily, find Mr. Painter "unfit" in the sense that the word is used in these authorities.

No decision of the United States Supreme Court has set constitutional standards for child custody cases, save the requirement of notice and opportunity to be heard.[24] It would be wrong to elevate Petitioner's extreme position to constitutional stature. These difficult cases are best handled locally, and the state courts must be left with sufficient discretion to fashion appropriate decrees in the widely varied factional situations coming before them.

(d) In child custody cases courts must consider the ways of life of the contestants to enter an appropriate decree. But the Iowa court in this case considered such matters only from the standpoint of what this particular child needs, and the adjustments he would be required to make if moved from one environment to the other. The fact that custody was awarded to Respondents does not mean that their way of life was found superior to Petitioner's, except as related to the particular needs of Mark.

Petitioner complains of the characterization of him by the court. The court said:

---

[24] Armstrong v. Manzo, 380 U. S. 545, 85 S. Ct. 1187 (1965). In accord is Stubbs v. Hammond, 135 N. W. 2d 540 (Iowa, 1965).

"In the Painter home, Mark would have more freedom of conduct and thought with opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable."

* * * * * * *

"We believe it (life in the Painter household) would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating."

The words were used to describe, not pass judgment upon. ("These matters are not related as a criticism of Mr. Painter's conduct, way of life or sense of values. An individual is free to choose his own values, within bounds, which are not exceeded here.")

Petitioner does not complain that the words used are inaccurate. In large part they are based upon his own description of himself as shown by the record in this case. The first paragraph above refers to Petitioner as being "romantic" and "impractical". "Romantic", according to Webster's Third New International Dictionary, is a synonym of "impractical". Exhibit 24, a letter written by Mr. Painter, states:

"I think I very badly need a manager or a good business agent, since I'm apt to be heady and impractical."

The second paragraph above refers to Petitioner as "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating." Webster defines "Bohemian" as "one who reflects protest against or indifference to social convention." Exhibit 23 is a letter which Mr. Painter wrote in connection with his Washington University employment:

"I'm afraid academic institutions, or for that matter, any organization large enough to go by the name of institution, do not set very well with my nature.

> For one thing, their purposes are never mine. My work here has been in defiance of the established way of doing things. . . . As for Committees v. Painter, I either say nothing and inwardly chuckle at what I think to be their folly, or say nothing and do what I want to do, or say something pointed and do nothing. I sometimes wish I had a public personality—with the guts of a Brooklyn Jew and the quick, devious logic of a Darrow—then maybe I could bend committees to my own ends. But my thought process is geared to the written word, and I am always thinking in sort of written rhetoric—a sort of meticulously designed rocket that will explode on contact when I am, at a distance, arming another. . . ."

And in Exhibit 24 he wrote:

> "I detest, with a passion, commercial portraiture; every time I pass Hutchinson's Studio, I want to throw a rock through the window. This is more canned soup."

Surely Petitioner did not consider the descriptions degrading or insulting when he wrote them; why should he assume that the court used them in that sense? In the same paragraph in which the court used the words "unconventional" and "Bohemian" to describe the Painter household it also used the words "intellectually stimulating." No fair-minded person could conclude that the Iowa court was opposed to intellectual stimulation.

In a child custody case the court must, of absolute necessity, consider the character and circumstances of the prospective custodians. It could not otherwise decree custody in the best interest of the child. Perhaps, as Respondent suggests, there are dangers in this. But the danger would be much greater if the court failed to consider the character and emotional make-up of the contestants and the child's compatibility to each.

Just because Mr. Painter was denied custody, it does not follow that the description of his character and circumstances implied rank disapproval of him. Petitioner overlooks references to him in the opinion which could not possibly be interpreted as uncomplimentary:

1) He received an honorable discharge from the Navy.

2) His marriage to Jeanne was, overall, a happy one.

3) There is no suggestion in the record that he is morally unfit.

4) In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects.

5) The Painter household would probably be intellectually stimulating.

Many would think that a label of "conventional", such as the court used to describe the Bannisters, was not complimentary (but nevertheless accurate when compared to Painter). The point is, one misses the intent of the opinion if in reading it he assumes that every word or phrase connotes an approval or disapproval of the character trait or value referred to.

The obvious purpose of showing the divergent ways of life of the Painters and the Bannisters was to demonstrate the abrupt change to which Mark would be subjected if moved. Here is a child who, after a series of very traumatic experiences, has settled into a pattern of life in which he has found happiness. He is in his latency period of development, which is the very critical stage where he is developing most of his concepts and attitudes about himself and the world (R. 415, 429, 430). He has spent

much time since living with the Bannisters in determining who he is and where he fits into his environment (R. 430). He views Mr. Bannister as his father figure and Mrs. Bannister as his mother figure, and he sees a place for himself in the Bannister family (R. 420). He is doing well in school and has many friends (R. 421). He has come a long way in developing a concept of his role in life (R. 430). Now the Painters want to take him to California, and for Mark this would mean starting all over again. Dr. Hawkes felt the chance of success was not good (R. 430).

It was with this evidence before it that the court contrasted the divergent ways of life of the Painters and the Bannisters. It was to show the substantial adjustment that Mark would have to make. If the situation were reversed (a move from the unconventional to the conventional), the same considerations would apply. The Iowa Court said:

> "It is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so. **However, the philosophies are important as they relate to Mark and his particular needs.**" (Emphasis added.)
>
> * * * * * * *
>
> "These matters are not related as a criticism of Mr. Painter's conduct, way of life or sense of values. An individual is free to choose his own values, within bounds, which are not exceeded here. They do not serve, however, to support our conclusion as to the kind of life Mark would be exposed to in the Painter household."

To deny a court the right to view the total picture before making a child custody award is to deny it the right to make an award in the best interest of the child. The Federal Constitution does not impose such restrictions.

2. The Iowa court remained neutral in the matter of religion, and any consideration given to it was merely temporal, that is from the standpoint of the adjustments which the child would have to make in changing from one religious environment to another. Adequate state grounds support the decision.

The decision makes the following references to religion of the parties:

> 1) "Mr. Bannister . . . regularly teaches a Sunday School class at the Gilbert Community Church."
>
> 2) "Mr. Painter is either an agnostic or atheist and has no concern for formal religious training. He has read a lot of Zen Buddhism and 'has been very much influenced by it'."
>
> 3) "Mrs. Painter is Roman Catholic."
>
> 4) "They (the Painters) plan to send Mark to a Congregational Church near the Catholic Church, on an irregular schedule."

There can be no doubt that a court may not constitutionally prefer one religious denomination over another in the sense that it believes one denomination or another to be spiritually superior. No such problem could present itself in this case, for Mark would be raised in the congregational Church regardless of who prevailed. It has traditionally been thought that courts could, in child custody cases, recognize the value of religious training of some type for the child as opposed to no religious training.[25] But again, this question is not presented in this case as the Painters would send Mark to a church and Sunday School as have the Bannisters.

It is clear that the Supreme Court of Iowa, if it gave any weight at all to religious matters, did so only as ap-

---

[25] 66 A. L. R. 2d 1410, 1413-1416.

plied to the boy's temporal welfare. The evidence would justify this in at least two respects.

First, Mark was overly-aggressive when he came to Iowa, to the point of being cruel to other children and animals. The potential for such behavior is still very much present. Apart from the theological aspects involved, the court might well have concluded that this boy needs moral training such as would be available in a church, and that his regular Sunday School and church attendance in the Bannister home is desirable.

Second, Mark has since July of 1963 attended Sunday School and church with one or both grandparents who have served as examples for him and who have been able to support his religious development because of their own beliefs. Before Mark's mother died, he had the advantage of a Congregational parent who could and did furnish him the same kind of support. If he were to go into the Painter home, however, he would be confronted with a confusing situation. He would be **sent** to a Congregational Church and would have nobody in his home to share and strengthen the beliefs of that church, Mr. Painter being agnostic and Mrs. Painter being Roman Catholic. This is an unhealthy situation for this particular child because of his need to identify and develop definite values. Dr. Hawkes so testified, without objection (R. 438). A closely-related problem is the **change** which Mark would be subjected to if moved—a change from parents who are able to support his specific religious convictions to parents who are not, and a change from regular Sunday School and church attendance to irregular attendance.

Each of the above considerations are from the standpoint of Mark's temporal welfare. Religion is incidental. They are the same types of circumstances which, for the sake of the child's mental health, would mitigate against a change from Catholic to Protestant custodians, Jewish

to Catholic, non-Christian to Christian, etc. Such considerations do not remove the state from a neutral position on religious matters so long as a particular belief is not preferred because of what is thought to be its intrinsic value.

Much of what was said in 1 (d) is applicable to complaints relating to religion.

It is clear that the court's reference to religion was incidental. The decision rests upon adequate state grounds, and thus is not reviewable by the United States Supreme Court. Durley v. Mayo, 351 U. S. 277; Dixon v. Duffy, 342 U. S. 33; Young v. Ragen, 337 U. S. 235. In the cases cited by Petitioner on p. 33, the complaining parties were penalized for their religious beliefs. No such situation exists here.

3. The decision of the Iowa court was based upon substantial evidence.

Finally, Petitioner urges that the decision below rests upon no evidence at all, and thus constitutes a denial of due process. The weight to be accorded the evidence is for the Iowa courts to determine. Dr. Hawkes is a highly competent and respected child psychologist. Three teachers and a minister also testified to the harmful effect they thought a move would have on Mark. Petitioner had a full opportunity to present evidence in this regard, but was either unable to obtain it or chose not to do so for some other reason. The Supreme Court of Iowa decided this case on the basis of the substantial evidence before it.

RESPONSE TO AMICUS CURIAE BRIEFS.

Petitions to file amicus curiae briefs on behalf of petitioner, with briefs attached, have been filed by (1) The American Civil Liberties Union and The Iowa Civil Lib-

erties Union, and (2) Board of Christian Social Concerns, New York Annual Conference of the Methodist Church; (3) The State of California has also filed a brief.

Respondents resist the respective petitions to file briefs, but make the following response in the event the petitions are granted:

(1) The brief of the American and Iowa Civil Liberties Union advances the same arguments as the principal petition, and we adopt our Brief in Opposition as our response here. We confess surprise at the brief of the American Civil Liberties Union in view of its earlier action in this case. When considering on February 28, 1966, whether to file an amicus curiae brief in the Supreme Court of Iowa in support of the Petition for Rehearing, the Board of Directors of the American Civil Liberties Union voted not to file such a brief on the ground "that the Union does not believe that there is a civil liberties issue to justify our intervention, howevermuch we dislike the language of the decision, and that we advise the Iowa Civil Liberties Union of our position."[26]

(2) In response to the brief of the Board of Christian Social Concerns, New York Annual Conference of the Methodist Church, we adopt our Brief in Opposition to Petitioner's petition.

(3) The brief of the State of California raises an issue not raised by Petitioner, to-wit, that the law of California should have been applied by the Supreme Court of Iowa. We do not feel justified in responding at length to a matter not even involved in the petition, except to note that no federal question is raised in this respect and that Petitioner did not plead or prove California law in this case

[26] Minutes of Board of Directors of the American Civil Liberties Union of February 28, 1966. Reference to these minutes is made in footnote 31 of the comment on this case in 79 Harvard L. Rev. 1710, 1715.

as required by Iowa law, In re Estate of Drumheller, 252 Iowa 1378, 110 N. W. 2d 833, nor did he ask the Supreme Court of Iowa to apply California law at the time the case was originally submitted on appeal. Further, the law of the forum where a custody issue is raised for determination, rather than the law of the domicile of the child, determines custody matters.[27]

CONCLUSION.

The writ of certiorari should be denied.

Respectfully submitted,

JOHN L. BUTLER,

JACK A. HALL,
Eldora, Iowa 50627,
Attorneys for Respondents.

Of Counsel:
LUNDY, BUTLER, WILSON & HALL,
Eldora, Iowa 50627.

October, 1966.

---

[27] 15 C. J. S., Conflict of Laws, § 14 (d), p. 911; 67 C. J. S., Parent and Child, § 4, p. 630; Goodrich, Conflict of Laws, Section 136, p. 272.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
NOV 9 1966
JOHN F. DAVIS, CLERK

No. 518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend, *Petitioner*,

v.

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

REPLY BRIEF FOR PETITIONER

WILLIAM H. ALLEN
BRICE M. CLAGETT
JOHN E. VANDERSTAR
701 Union Trust Building
Washington, D. C. 20005

DONALD R. PAYER
537 Main Street
Ames, Iowa 50010

Attorneys for Petitioner

Of Counsel:

COVINGTON & BURLING
PAYER & VANDERBUR

November 1966

INDEX

	Page
I. The Federal Questions Were Timely Raised	1
II. Harold Painter Is a Fit Father Who Is Qualified to Determine His Son Mark's Welfare	8
III. To Deprive Harold Painter, a Fit Parent, of the Custody of His Child Violates the Federal Constitution	13
IV. In No Event Can a Parent Lawfully Be Deprived of the Custody of His Child Because of His Political or Religious Views	18
Conclusion	21
Appendix	22

TABLE OF AUTHORITIES

Cases:

Altmiller v. *Forsman*, 76 Idaho 521, 285 P.2d 1064 (1955) ... 23
Armstrong v. *Green*, 260 Ala. 39, 68 So. 2d 834 (1953) 22
Bailey v. *Mars*, 183 Conn. 593, 87 A.2d 388 (1952) 22
Baram v. *Schwartz*, 151 Conn. 315, 197 A.2d 334 (1964) 22
Beach v. *Leroy*, 228 Ind. 122, 89 N.E.2d 912 (1950) 23
Bell v. *Leonard*, 251 F.2d 890 (D.C. Cir. 1958) 22
Brinkeroff-Faris Trust & Sav. Co. v. *Hill*, 281 U.S. 673 (1930) 3
Brown v. *Beachler*, 224 Ind. 477, 68 N.E.2d 915 (1946) 23
Brown v. *Ellison*, 162 So. 2d 805 (La. App. 1964) 24
Carrere v. *Prunty*, 133 N.W.2d 692 (Iowa 1965) 7
Childers v. *Childres*, 136 N.W.2d 268 (Iowa 1965) 7
Commonwealth ex rel. Gall v. *Reed*, 202 Pa. Super. 558, 198 A.2d 344 (1964) 25
Commonwealth ex rel. Insalaco v. *Delconte*, 413 Pa. 221, 196 A.2d 353 (1964), *affirming* 201 Pa. Super. 354, 192 A.2d 750 (1963) 25
Commonwealth ex rel. Ruczynski v. *Powers*, 206 Pa. Super. 415, 212 A.2d 922 (1965), *aff'd*, 421 Pa. 2, 219 A.2d 460 (1966) 25
Commonwealth ex rel. Shamenek v. *Allen*, 179 Pa. Super. 169, 116 A.2d 336 (1955) 17, 25
Drumb v. *Keen*, 47 Iowa 435 (1877) 6
Durst v. *Roach*, 245 Iowa 342, 62 N.W.2d 159 (1954) 7, 20
Ellison v. *Platts*, 226 Iowa 1211, 286 N.W. 413 (1939) 6
Fielding v. *Highsmith*, 152 Fla. 837, 13 So. 2d 208 (1943) 22
Finken v. *Porter*, 246 Iowa 1345, 72 N.W.2d 445 (1955) 7

	Page
Forbes v. *Warren*, 184 Miss. 526, 186 So. 325 (1939)	24
Giacopelli v. *Florence Crittenton Home*, 16 Ill. 2d 556, 158 N.E.2d 613 (1959)	23
Gibson v. *Dorris*, 386 P.2d 186 (Okla. 1963)	25
Glass v. *Bailey*, 233 Ind. 266, 118 N.E.2d 800 (1954)	23
Great Northern Ry. v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932)	2-3
Griggs v. *Barnes*, 257 Ala. 21, 57 So. 2d 61 (1952)	22
Halstead v. *Halstead*, 144 N.W.2d 861 (Iowa 1966)	5, 6
Hamilton v. *Sourjohn*, 332 Ill. App. 279, 75 N.E.2d 42 (1947)	23
Henry v. *Janes*, 222 Ark. 89, 257 S.W.2d 285 (1963)	22
Herndon v. *Georgia*, 295 U.S. 441 (1935)	3
Herr v. *Lazor*, 238 Iowa 518, 28 N.W.2d 11 (1947)	6
Hitchcock v. *Thomason*, 148 A.2d 458 (D.C. Mun. App.), *rev'd in part on other issue sub nom. Thomason* v. *Thomason*, 274 F.2d 89 (D.C. Cir. 1959)	22
In re Adoption of a Minor, 343 Mass. 292, 178 N.E.2d 264 (1961)	24
In re Burrus, 136 U.S. 586 (1890)	15-16, 17
In re J ——, 357 S.W.2d 197 (Mo. App. 1962)	24
In re McFarland's Guardianship, 214 Iowa 417, 239 N.W. 702 (1931)	6
In re Stuart, 114 F.2d 825 (D.C. Cir. 1940)	22
Jacobs v. *City of Chariton*, 245 Iowa 1378, 65 N.W.2d 561 (1954)	1
Jensen v. *Sorenson*, 211 Iowa 354, 233 N.W. 717 (1930)	6
Joiner v. *Knieriem*, 243 Iowa 470, 52 N.W.2d 21 (1952)	3, 7, 20
King v. *Shram*, 244 S.W.2d 720 (Tex. Civ. App. 1951)	26
Kirkum v. *Kasprzak*, 242 Ind. 198, 177 N.E.2d 459 (1961)	23
Konigsberg v. *State Bar*, 353 U.S. 252 (1957)	2
Kouris v. *Lunn*, 136 N.W.2d 502 (Iowa 1965)	7, 20
Long v. *McIninch*, 264 P.2d 767 (Okla. 1953)	25
May v. *Anderson*, 345 U.S. 528 (1953)	14
Meyer v. *Nebraska*, 262 U.S. 390 (1923)	14
Meyers v. *Shefrin*, 146 So. 2d 770 (Fla. App. 1962)	22
Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U.S. 313 (1930)	2, 3
Morris v. *Jackson*, 66 Wyo. 369, 212 P.2d 78 (1949)	26
McClary v. *Follett*, 226 Md. 436, 174 A.2d 66 (1961)	24
McKay v. *Mitzel*, 137 N.W.2d 792 (N.D. 1965)	24
McKay v. *Ruffcorn*, 247 Iowa 195, 73 N.W.2d 78 (1955)	7
McLendon v. *Pelt*, 208 Ark. 287, 185 S.W.2d 931 (1945)	22
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	16
Ohio ex rel. Popovici v. *Agler*, 280 U.S. 379 (1930)	17
Osburn v. *Roberts*, 197 Okla. 206, 169 P.2d 293 (1946)	17, 25
Paulson v. *Windelow*, 236 Iowa 1011, 20 N.W.2d 470 (1945)	6
Pelton v. *Halverson*, 240 Iowa 184, 35 N.W.2d 759 (1949)	6

Page

People ex rel. Bobroff v. *Levin*, 350 Ill. App. 501, 113 N.E.2d 177 (1953) 23
Root v. *Allen*, 151 Colo. 311, 377 P.2d 117 (1962) 22
Russell v. *Russell*, 208 Okla. 41, 253 P.2d 136 (1953) 25
Schiller v. *Douglas*, 48 Idaho 803, 285 Pac. 1021 (1930) 23
Scott v. *Ashcraft*, 342 Ill. App. 33, 95 N.E.2d 122 (1950) 23
Smith v. *Smith*, 188 Tenn. 430, 220 S.W.2d 627 (1949) 25
State ex rel. Paul v. *Peniston*, 235 La. 579, 105 So. 2d 228 (1958) 24
Stout v. *Massie*, 140 W. Va. 731, 88 S.E.2d 51 (1955) 26
Taylor v. *Taylor*, 182 Okla. 11, 75 P.2d 1132 (1938) 25
Testerman v. *Frederich*, 323 S.W.2d 522 (Mo. App. 1959) 24
Thumma v. *Hartsook*, 239 Md. 38, 210 A.2d 151 (1965) 24
Trenton v. *Christ*, 216 Md. 418, 140 A.2d 660 (1958) 24
Trotter v. *Pollan*, 311 S.W.2d 723 (Tex. Civ. App. 1958) 26
Turner v. *Hunter*, 142 Colo. 129, 350 P.2d 202 (1960) 22
Van Auken v. *Wieman*, 128 Iowa 476, 104 N.W. 464 (1905) .. 3
Wall v. *Hardee*, 240 N.C. 465, 82 S.E.2d 370 (1954) 24
Watters v. *Watters*, 243 Iowa 741, 53 N.W.2d 162 (1952) 3
Wehrman v. *Farmers & Merch. Sav. Bank*, 221 Iowa 249, 259 N.W. 564 (1935) 1
Werling v. *Heggen*, 208 Iowa 908, 225 N.W. 952 (1929) 6
Whiteman v. *Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960) 26
Wooley v. *Schoop*, 234 Iowa 657, 12 N.W.2d 597 (1944) 3, 5, 6

Constitution and Statutes:

United States Constitution, First Amendment 19
Iowa Code § 633.559 3
Iowa Code § 668.1, .2 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 518

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend, *Petitioner*,

v.

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

REPLY BRIEF FOR PETITIONER

I. THE FEDERAL QUESTIONS WERE TIMELY RAISED

Respondents assert that the federal questions presented by petitioner were not timely raised because they were first asserted in a petition for rehearing of the decision of the Iowa Supreme Court. Respondents, citing Iowa cases,[1] say that the Iowa Supreme Court

[1] Jacobs v. City of Chariton, 245 Iowa 1378, 65 N.W.2d 561 (1954); Wehrman v. Farmers & Merch. Sav. Bank, 221 Iowa 249, 259 N.W. 564 (1935).

declined to consider the constitutional questions raised by petitioner because of an Iowa rule of practice. (Br. in Opp. p. 18). Any such rule is not binding on this Court in all circumstances, and there is no indication in the bare order of the Iowa Supreme Court—"rehearing denied" (R. 938)—that it did decline to consider the constitutional questions. The court unquestionably entertained petitioner's timely-filed petition for rehearing. It is just as consistent with the terms of its order that the Iowa Supreme Court considered petitioner's constitutional claims and rejected them on their merits as that it refused to consider them because they were not timely raised. *Cf. Konigsberg* v. *State Bar,* 353 U.S. 252, 254-58 (1957).

We recognize, however, the rule of this Court that "ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more." *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U.S. 313, 320 (1930). That rule is a specific application of the general rule governing the Court's jurisdiction, that a state court that does not expressly pass upon a federal claim will not be taken to have denied it unless the claim was advanced at the earliest opportunity available under the state's practice. The rule does not apply, therefore, when the state court whose decision it is sought to bring here has departed from prior law or introduced some other surprising element into its decision. On these occasions a petition for rehearing affords the first real opportunity for asserting the federal claim, and the case is properly here even though the state court's denial of rehearing is ambiguous with respect to whether the federal claim was passed upon. *Great Northern Ry.* v. *Sunburst Oil & Ref. Co.,* 287 U.S.

358, 366-67 (1932); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U.S. 673, 677-78 (1930); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner, supra.* Or, as put by Mr. Justice Cardozo in a notable dissent, "The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely." *Herndon* v. *Georgia,* 295 U.S. 441, 447 (1935).

This case is within the "surprise" doctrine as thus defined. An Iowa statute, enacted in 1963, provides that "the parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian." Iowa Code § 633.559. A predecessor statute had provided very much the same thing. Iowa Code §§ 668.1, .2 (Pet. App. pp. 1a-2a). Consistently with the statute, the Iowa Supreme Court had ruled that, in the case of a dispute over custody between a parent and a non-parent, "if the parent is a proper and competent person, and has not waived or forfeited his right, custody must be awarded to him." *Wooley* v. *Schoop,* 234 Iowa 657, 660, 12 N.W.2d 597, 599 (1944), quoting from *Van Auken* v. *Wieman,* 128 Iowa 476, 104 N.W. 464 (1905). The Iowa court had also declared that "the statutory parental right of child custody . . . is an absolute right if the parent is properly qualified for the custody." *Joiner* v. *Knieriem,* 243 Iowa 470, 479, 52 N.W.2d 21, 26 (1952).[2]

---

[2] See also Watters v. Watters, 243 Iowa 741, 744, 53 N.W.2d 162, 163 (1952) ("The unfitness which deprives a parent of the right to custody of a child must be positive, and not merely comparative").

Petitioner was awarded custody of his son by the trial court after a habeas corpus proceeding in which the principal claim of the respondents was that he was unfit and had relinquished his child to them. The court found that there was "no evidence that he is an unfit father" and "no evidence that he abandoned the child" and declared that it was convinced in those circumstances that it was "for the best interests of the child . . . that he be placed permanently in the care and custody of his father." (Pet. App. p. 20a). It paid no heed to petitioner's political and religious views, and it discounted the testimony of respondents' psychologist expert, who had never seen petitioner.

Had the trial court ruled that, despite the findings that petitioner was fit and had not abandoned his child, the child should remain with his grandparents because that would serve his best interests, constitutional doubts would have been raised. But there was no such ruling, and petitioner, defending the trial court's decision on appeal, thus had no occasion for raising any constitutional question. Nor was there reason to conclude that unless the Iowa Supreme Court disagreed with the trial court as to his fitness and his not having abandoned his child it would find, according to its customary verbal formula, that Mark's best interests required that he remain with his grandparents. Respondents argued on appeal that they should have custody regardless of petitioner's fitness or his continuing intention to bear the obligations of parenthood, but petitioner was not bound to contend in reply that acceptance of such an argument would yield an unconstitutional result. It was enough to say that the argument ran counter to Iowa law, as indeed it did.

For *Wooley* v. *Schoop, supra,* and the other cases from which we have quoted were on the books; and the governing statute had lately been revised to make it even clearer than before that a fit and qualified parent is entitled to custody of his own child. (See p. 3, *supra.*)

That this was the law of Iowa was plain at the time the appeal in this case was heard and decided. The decision in this case effectively changed the law, and this has lately been confirmed by the Iowa Supreme Court. In *Halstead* v. *Halstead,* 144 N.W.2d 861 (Iowa 1966), decided seven months after this case, *Wooley* v. *Schoop* was expressly overruled. The court, awarding custody of a 12-year-old boy to his grandparents over the claim of his mother, who was not found unfit or to have abandoned the child, said that "to the extent the majority opinion in Wooley v. Schoop . . . is in conflict herewith it is specifically overruled." 144 N.W.2d at 867.[3] Only with this express overruling of prior law, coming after the decision in petitioner's case, did it unmistakably become the law of Iowa that a fit parent who had not relinquished custody of a minor child could be deprived of that custody

[3] Although, as we suggest (p. 15, *infra*), there is a constitutional distinction between a case like this one, involving a continuing family unit, and a case in which the family unit has previously been destroyed by divorce, the Iowa court has assimilated the two situations. Both Wooley v. Schoop, 234 Iowa 657, 12 N.W.2d 597 (1944), asserting the right of a fit parent to custody, and Halstead v. Halstead, 144 N.W.2d 861 (Iowa 1966), overruling *Wooley* v. *Schoop,* were cases in which there had been a divorce. The *Halstead* opinion is in such terms as to make clear that the new rule that a fit, non-abandoning parent can be deprived of custody of his child because of the court's independent judgment that he would be better off with others applies in both divorce and non-divorce cases.

because of a court's judgment of what the child's best interests required. Prior cases cited by respondents (Br. in Opp. p. 23 n.11) are distinguishable, as are cases asserted by the Iowa court in the *Halstead* opinion to have undermined the rule of *Wooley* v. *Schoop*.[4]

---

[4] There is unquestionably a great deal of language in the Iowa cases to the effect that the best interests of the child are the governing consideration in every custody case. We believe, however, that until the decisions in this case and in Halstead v. Halstead, 144 N.W.2d 861 (Iowa 1966), all the cases were consistent with the view expressed in In re McFarland's Guardianship, 214 Iowa 417, 425, 239 N.W. 702, 706. (1931), where the court said that a surviving parent is entitled to custody "unless it be that he had abandoned his child or forfeited or waived his rights to his custody, or unless it be that he is not a fit and suitable person to have his custody *and* that the best interests of the child require that his custody be entrusted to others." (Emphasis added). In other words, the court did not undertake to make its judgment of where the best interests of the child lay until the presumptive parental right to custody was overcome by a showing of relinquishment or unfitness. An analysis of the cases cited by respondents (Br. in Opp. p. 23 n.11) from this standpoint follows:

Drumb v. Keen, 47 Iowa 435 (1877) (father with "unsuitable home" denied custody until his home situation changed).

Werling v. Heggen, 208 Iowa 908, 225 N.W. 952 (1929) (child a hopeless invalid whose health would be endangered by moving to home of father from whom mother was separated with divorce action pending at her death).

Jensen v. Sorenson, 211 Iowa 354, 233 N.W. 717 (1930) (divorce; abandonment; prior court appointment of the non-parent contestant for custody as guardian with parent's full consent).

Ellison v. Platts, 226 Iowa 1211, 286 N.W. 413 (1939) (unfitness).

Paulson v. Windelow, 236 Iowa 1011, 20 N.W.2d 470 (1945) (twelve-year acquiescence in custody of non-parent).

Herr v. Lazor, 238 Iowa 518, 28 N.W.2d 11 (1947) (divorce; unfitness and probably abandonment).

Pelton v. Halverson, 240 Iowa 184, 35 N.W.2d 759 (1949) (implied waiver of custody in 11-year separation).

Petitioner thus was justified in relying upon the rule of parental right stated in the Iowa statutes and affirmed in case law and in arguing on that basis that if he was found a fit parent and found not to have abandoned his child he was entitled to custody. He was not obliged to argue that were he found fit and found not to have abandoned his child it would be unconstitutional to deprive him of custody of his child. Particularly petitioner was not bound to anticipate that he would be deprived of such custody on the basis of his political views (scarcely mentioned and not argued by respondents in the Iowa Supreme Court), his religious beliefs (laid bare at trial, to be sure, and argued by respondents as a reason that petitioner was unfit, not as an independent ground for denying custody to him) or the testimony, discredited by the trial court, of a psychologist who knew nothing of him or his fitness to be a parent.

Joiner v. Knieriem, 243 Iowa 470, 52 N.W.2d 21 (1952) (divorce; unfitness; court ruled that right of parent to custody "is an absolute right if the parent is properly qualified for the custody"; see p. 3, *supra*).

Durst v. Roach, 245 Iowa 342, 62 N.W.2d 159 (1954) (divorce; implied finding of unfitness and that parent had "discarded" child).

Finken v. Porter, 246 Iowa 1345, 72 N.W.2d 445 (1955) (divorce; unfitness).

McKay v. Ruffcorn, 247 Iowa 195, 73 N.W.2d 78 (1955) (five-and-a-half-year separation; unfitness).

Carrere v. Prunty, 133 N.W.2d 692 (Iowa 1965) (divorce; abandonment).

Childers v. Childres, 136 N.W.2d 268 (Iowa 1965) (six-and-a-half-year separation; abandonment).

Kouris v. Lunn, 136 N.W.2d 502 (Iowa 1965) (unfitness).

II. HAROLD PAINTER IS A FIT FATHER WHO IS QUALIFIED TO DETERMINE HIS SON MARK'S WELFARE

On respondents' professed view of the case the essential, relevant facts are (1) that at the time of the trial Mark had lived with the Bannisters for two years, (2) that in those two years Mark established a "family relationship" with the Bannisters (who are his grandparents), (3) that a child of Mark's age is better off if he remains "settled," and (4) that a change of Mark's custody would be "abrupt" because the Bannisters' home and way of life are more "conventional" and "stable" than the Painters'. On this view there would be no need to comb the record for every scrap of testimony casting doubt upon the character and personality of Mark's father. The greater part of respondents' statement of the case would be irrelevant, beginning with the fact that Harold Painter was placed in a foster home at age 2½ "because neither his mother nor his father were allowed to have him" (Br. in Opp. p. 3) and continuing through the fact that "throughout Mr. Painter's testimony there were references to his temper" (*id.* p. 7); also irrelevant would be such facts as that in April 1964 Painter and Helen Boutell abandoned their marriage plans (*id.* p. 10).

In their cataloguing of such facts and innuendoes, and in their bald assertion that "a court may make such an award of custody as best serves the child's welfare" (*id.* p. 24), respondents reveal the true nature of the position they successfully pressed on the court below: The Bannisters are better suited to rear Mark than his own father is, and therefore the court should award custody to them.

It is perfectly plain that Harold Painter, who has some uncommon aspirations and some all-too-common

faults, does not satisfy respondents' concept of the ideal human being. It is true, for example, that after the petition in this case was prepared he and his wife moved from their home in Walnut Creek. (See Br. in Opp. pp. 17-18). They now have a three bedroom home in the coastal redwood area of California, near Santa Cruz. (See Br. in Opp. pp. 17-18.) There Painter works as a free-lance writer and photographer; his wife keeps house and acts as his secretary. In respondents' strange lexicon this presumably makes Painter "unemployed" (see Br. in Opp. pp. 4, 5), but in fact he is doing just what he has always wanted to do and is making a financial and professional success of it.

With respect to most of what respondents say in their statement it is enough to invite attention to the opinions of the trial court, which heard the witnesses, and the Iowa Supreme Court itself. The trial court after canvassing the evidence found that "the plaintiff [Harold Painter], the father of Mark Painter, is a proper and fit person to have the care and custody of his own minor son . . ." (Pet. App. pp. 19a-20a) and that the arrangement by which the Bannisters were to care for Mark was intended to be temporary (*id.* p. 17a). The Supreme Court substantially agreed. (*Id.* pp. 5a, 8a).

There are some matters, however, as to which the record should be set straight.

1. Respondents state that Painter left one job "for less pay because he wanted a job 'that would be just enough to get by and require as little work as possible (R. 42) . . .'" (Br. in Opp. p. 4). The record does not bear out the statement, much less the innuendo. Painter's testimony at the record page cited describes

a plan, not carried out at that time (1959), whereby *his wife* "Jeanne would take a job that would be just enough to get by and require as little work as possible" so that he could try free-lancing on a full-time basis.

Respondents also say that after leaving his job at Washington State University in 1962:

> "Mr. Painter had about eight job offers but turned them all down (R. 51). To support the family his wife, Jeanne, took a full-time job with a newspaper at Moscow, Idaho." (Br. in Opp. p. 5).

Again one is presumably meant to infer that Painter is a scoundrel. But again the cited record page makes clear that such an inference is unwarranted, for the decision that Jeanne Painter should work while her husband tried serious free-lancing was a joint one; the suggestion indeed was hers. (See Pet. p. 7).

2. In referring to Painter's "temper," respondents claim that Painter "said he 'blew his stack' at his wife (R. 144 . . . ." (Br. in Opp. p. 7). The sentence from which this quotation is torn reads as follows: "I also blew my stack at the letter Jeanne received from her father and got quite angry about this."[5]

3. Respondents state that Painter testified he thought Mark should be in a "permanent" home where his school would not be interrupted. (Br. in Opp. p. 8). That is true. At the time Painter had those thoughts

---

[5] The inconsequentiality of most of what respondents write is demonstrated by a comparison of the things respondents say about Painter with what could be said about Dwight Bannister on the basis of the record here. Neither tribunal below had any doubt about Bannister's qualifications to act as a parent, although he has a temper (R. 87), seems to be singularly tactless in his dealings with people (R. 100-02) and is capable of deliberately deceiving a father about the whereabouts of his son (R. 96-97, 563-64).

he was working erratic hours on a newspaper, with frequent night work, and Mark was staying with the McNellys, who lived in one of their two house trailers when they were not off on extended fishing trips. (R. 62-63). Of course Painter wanted Mark's life to become settled down, but it is crystal clear that the arrangement with the Bannisters was intended to be temporary, and both courts below so found.[6]

Respondents carry this point a step further with the insinuation that in September 1964 Painter was not really sure whether he wanted his son back:

> "Regarding that visit, he [Painter] testified he 'was not sure about my interest as to taking Mark back in September . . . The same unstable situation existed that existed at the time I sent him to Ames so I was apprehensive about this disrupting of him' (R. 83-84)." (Br. in Opp. pp. 9-10).

Once more the full context gives a different, indeed opposite, impression from respondents' excerpts:

> "I was not sure about my intent as to taking Mark back in September. *I certainly wanted to take Mark back.* I was also concerned about what is

[6] They made the finding with conflicting testimony before them as to what discussion there was of financial arrangements for Mark's care during his stay with the Bannisters. Respondents set forth Dwight Bannister's version, which was that Painter ignored a suggestion that he contribute $50 a month to Mark's support. (Br. in Opp. p. 10). Painter's recollection was that Bannister said no contribution was necessary, and that his, Painter's, offers to pay Mark's medical bills were ignored. (R. 74-75). There is no basis in the record for respondents' suggestion (Br. in Opp. p. 7) that Painter asked them to take Mark to Iowa because his step-parents, with whom Mark was staying, had asked him to help pay for the support of Mark. As the courts below found, petitioner did not abandon his son, financially or otherwise. (*Cf.* Br. in Opp. p. 28).

> in it for him, what is he going to return to. I was not yet married. The same unstable situation existed that existed at the time I sent him to Ames so I was apprehensive about this disrupting of him. By unstable condition, I am referring to the fact that I was not married and that Marylyn and I had not yet decided on a date. I did not have a place rented for Mark and I to live in. I felt there should be some transition period in which Mark had a chance to get acquainted with my wife." (R. 83-84). (Emphasis added).

Against these examples of how respondents have rendered the record, their complaint that petitioner's statement of the case is slanted to the point of inaccuracy (Br. in Opp. p. 16) rings hollow. The prime instance of alleged inaccuracy relates to the Painters' attempt to take Mark from his school in June of 1965. Respondents do not agree that "when the school authorities intervened and called the Bannisters, the Painters desisted rather than use anything resembling force . . ." (Pet. p. 10). The quotation from the record that they give does not bear respondents out. Moreover, it is incomplete and omits this testimony of Harold Painter:

> "When we got [to] the car, we were stopped by the High School Principal, Mr. Schwenk, who informed me I was violating the law by removing Mark from the premises without his permission; that I wasn't the one who had enrolled Mark in school, therefore, I wasn't the one who could remove him from the school grounds.
>
> "I said, 'Fine, we will go into the office and discuss this.'
>
> * * *
>
> "Well, I said at this point, I certainly did not want Mark to engage in a tug-of-war between my-

self and the Bannisters, this would not be a good thing for Mark, this scene. Therefore, I said, our only alternative at this point was to press and take legal action, obtain court order, and we did—then left the premises and took legal action." (R. 104-06; see also R. 166).

III. TO DEPRIVE HAROLD PAINTER, A FIT PARENT, OF THE CUSTODY OF HIS CHILD VIOLATES THE FEDERAL CONSTITUTION

At the very outset of their argument against granting the writ, respondents assert that Harold Painter "does not have a 'family relationship' with Mark because he has not had his custody since July of 1963." (Br. in Opp. p. 19). This ignores the fact, found by the trial court and recognized by the Supreme Court of Iowa, that Mark's stay with the respondents was expressly understood to be on a temporary basis; it was only the respondents' refusal to honor that agreement that prolonged the temporary stay and made this litigation necessary. Respondents' statement is legally as well as factually inaccurate. There is no question that, as Mark's father, Harold Painter had legal custody and control until the Iowa Supreme Court awarded custody to respondents. A parent does not lose custody of his child by allowing him to stay temporarily with others.

This error of respondents underlies their attempt (Br. in Opp. pp. 20-21) to distinguish the decisions of this Court relied on by petitioner for the proposition that parents have constitutional rights with respect to the upbringing and control of their children. Respondents argue that (1) these cases did not involve custody disputes, and (2) the parents recognized as having constitutional rights had custody of the children

in question. Both arguments are wide of the mark. The cases in question (discussed at Pet. pp. 18-21) hold that parents have rights with respect to the upbringing and control of their children that a state may not constitutionally abridge. All these rights would be nullities if there were a constitutionally unrestricted state power entirely to deprive parents of the custody of their children. All other parental rights are corollaries of the basic constitutional right to custody itself. If a state cannot, for example, constitutionally prohibit parents from teaching their children foreign languages, *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), then *a fortiori* a state cannot deprive a parent of the custody of his child altogether—and thus destroy the right to teach him foreign languages, among many other rights—without constitutionally permissible reasons. The parent's right is to the "care, custody, management and companionship" of his child and the direction of the child's upbringing. *May* v. *Anderson,* 345 U.S. 528, 533 (1953).

It thus cannot possibly be disputed that there are substantive constitutional limitations on the power of a state to award custody of a child to persons other than his parents; were that not so, every parental prerogative that this Court has hitherto recognized would be meaningless, since the parent could be deprived of those rights by non-reviewable state action vesting custody in another. The question whether Iowa exceeded those constitutional limitations when it deprived an admittedly fit, non-abandoning, non-divorced parent of custody, in the circumstances in which and on the grounds on which it did so here, is the important and novel question presented in this case.

Respondents' refusal to recognize the difference between the present case and cases in which a family unit has been dissolved by divorce is another aspect of their attempt to deny the existence of a continuing relationship, in law and in fact, between Harold Painter and his son Mark. Respondents declare (Br. in Opp. p. 26 n. 15) that "in both types of cases there has been a dissolution of the family." Here there was no such dissolution, but only a temporary visit that was obviously in Mark's best interests at the time his father initiated it. We submit that it may be reasonable that in some situations involving divorce, where custody of a child has been awarded to a spouse who subsequently dies (by far the most numerous and typical class of custody cases), the surviving parent—who has lost custody either through agreement or through order of the divorce court—may not regain the child if it is found to be in the child's best interests to stay where he is. No "punishment" (*ibid.*) of divorced parents is involved, but merely a recognition of the acts that they themselves have taken. This case, of course, is wholly different. The rule for which petitioner contends is not based on exalting "the interests of the adult litigants" over the "child's interests" (*ibid.*) but on a recognition that, both from the standpoint of the child's interests and as a necessary corollary of the constitutionally required respect by the state for the sanctity of the family, a parent and a child, whose family has never been dissolved or destroyed, are entitled to be together unless unfitness or abandonment is shown.

Respondents urge (Br. in Opp. pp. 21-22) that in *In re Burrus*, 136 U.S. 586 (1890), this Court held

that matters of child custody are the exclusive preserve of the states and cannot present a federal question. There was not and could not be any such holding. The factual and procedural setting of the *Burrus* case makes it clear that the language there used did not carry any such implication as respondents see in it. In *Burrus,* a father disputing custody with a grandparent attempted to recover possession of the child by bringing a *federal* habeas corpus action; the state government was not involved at all. The petitioner's attempt failed; the Court pointed out the well-known statutory limitations on the availability of federal habeas corpus. Constitutionally the decisive fact was that no state action was involved; the dispute was purely between private parties.

In the present case the state *has* acted through its highest court, and the issue presented is whether that state action can be squared with the Fourteenth Amendment. *Cf. New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265 (1964). There can be no contention that the broad language in *In re Burrus* would prevent a federal question from arising, if, for example, a state had deprived a parent of custody because he was a Negro or because it disapproved of his religious views. Indeed, in their discussion of the religious aspect of the present case respondents, contending that the Iowa court "remained neutral in the matter of religion" (Br. in Opp. p. 34), implicitly concede, as they must, that if it did *not* remain neutral a federal question would exist. Neither *Burrus* nor any other case removes state action in the child custody area from constitutional scrutiny by this Court. In this area, as in every other, state action will be set

aside if the state has flouted fundamental constitutional prerogatives and freedoms.[7]

Respondents list 36 cases that they claim support their position, though they do not discuss the holdings of any of these cases. (Br. in Opp. p. 25 n. 14). An examination of these decisions, which presumably are the most favorable the respondents could find among the literally thousands of decided child custody cases, is illuminating. Not one of these cases presents a situation fairly comparable to that involved here. As indicated at page 25 of our Petition, many cases speak in terms of the best-interests doctrine, but in no more than two of the cases cited by respondents has that doctrine been applied so as to deprive a fit, non-abandoning, non-divorced parent and his child of their rights to each other's companionship and association.[8]

In most of the cases the parent in question had participated in the dissolution of his family by divorce. In no case in which a court relied on the detrimental effects of returning a child to a parent with whom he had not been living for some time had there been so short a period of separation as is here involved, and in no such case had there been, as here, an express understanding that the separation was to be purely

---

[7] Respondents also cite Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930), where the Court quoted the language of *In re Burrus* in passing on the jurisdiction of a state court to decide a divorce action brought against a foreign diplomat. The case has no relevance here.

[8] The possible exceptions are Osburn v. Roberts, 197 Okla. 206, 169 P.2d 293 (1946), and Commonwealth ex rel. Shamenek v. Allen, 179 Pa. Super. 169, 116 A.2d 336 (1955), cited in our Petition, p. 27, n. 15. (See p. 25, *infra*).

temporary. Many of these cases, further, comment on the great weight to be attached in child custody cases to the findings of the trial court, which has an opportunity to observe and assess the parties and witnesses—a weight that the Iowa Supreme Court here notably failed to accord the trial judge's decision that Mark should be returned to his father. Most of the cases acknowledge at least a presumption in favor of even a divorced parent much stronger than the presumption the Iowa court said it allowed the non-divorced parent in this case. Some of the cases cited by respondents declare the precise rule for which petitioner here contends.

A brief review of the salient features of the cases relied on by respondents is appended to this reply brief.

IV. IN NO EVENT CAN A PARENT LAWFULLY BE DEPRIVED OF THE CUSTODY OF HIS CHILD BECAUSE OF HIS POLITICAL OR RELIGIOUS VIEWS

The Brief in Opposition is wholly silent as to the constitutional issue posed by the Iowa court's taking into consideration, in its decision that he should not have custody of his child, the political views and activities of Harold Painter. Thus respondents do not appear to deny that this aspect of the decision below calls for the issuance of a writ of certiorari.

As for the Iowa court's consideration of the religious views and practices of the parties, respondents contend that consideration of such factors was proper "from the standpoint from Mark's temporal welfare" (Br. in Opp. p. 35). It is urged that the fact that "Mr. Painter is either an agnostic or atheist and has no concern for formal religious training," relied on by

the court below, was relevant to Mark's "temporal welfare" in that (1) the boy was "overly-aggressive when he came to Iowa," and the court might properly have concluded that he needed "moral training" in church and Sunday school; and (2) Mark's allegedly strong personal need for stability militated against any change in his life, even a difference in the religious affiliations of his guardian, though he himself would continue to attend Congregational church and Sunday school as in the past.

With respect to the first argument, it is plainly unconstitutional for a state agency to decide, and make effective its decision, that any person needs "moral training" that can be supplied only in a church or a Sunday school. The state may not prefer that type of moral training to other types, such as that which might be furnished by a parent's own teaching and example. If the Iowa court did rely on the first of the two reasons that respondents offer, its decision is blatantly violate of both the free exercise and establishment clauses of the First Amendment.

As to respondents' second proffered justification for the Iowa Supreme Court's consideration of religion, there is no hint in its opinion that its concern for religious views and training stemmed from a view that Mark's particular needs required that his life not be changed in any respect. The simpler and more straightforward explanation of the court's language is much more probable: that, without necessarily preferring any one theology or denomination to another, the court believes generally that religion is a "good thing" and that participation in any one of the conventional forms of organized religion is a hallmark of

a good citizen. That the Iowa court does take this view is confirmed by several of its decisions in child custody cases in which, having concluded that by unfitness a parent has lost his right to custody, it has mentioned the religious habits of the parties contesting custody with him as an indication that the child would be well off with them. *E.g., Kouris* v. *Lunn,* 136 N.W. 2d 502, 504 (Iowa 1965) ("she is a member of a church, but never attends, although she testified she would go to church and would take Jimmie to Sunday School if she secured his custody"); *Durst* v. *Roach* 245 Iowa 342, 62 N.W.2d 159, 168 (1954) ("he and Mrs. Roach are members of a church which they regularly attend, and they have private worship in the home"); *Joiner* v. *Knierniem,* 243 Iowa 470, 52 N.W.2d 21, 24 (1952) ("they are respected citizens in the community. They have maintained a good home and properly reared their children. Each Sunday the children attended church services").

This equation of sound citizenship and proper rearing of children with adherence to some sort of conventional religiosity is precisely the sort of thing that the Constitution forbids. The state may not use a person's non-adherence to conventional forms of religion as a basis for discriminating against him in any way. When the discrimination takes so savage and shocking a form as depriving a father of custody of his own child, the constitutional violation is one that cries out for rectification by this Court.

CONCLUSION

Nothing said in the Brief in Opposition detracts from the gravity of the constitutional questions presented. The writ should issue.

Respectfully submitted,

WILLIAM H. ALLEN
BRICE M. CLAGETT
JOHN E. VANDERSTAR
701 Union Trust Building
Washington, D. C. 20005

DONALD R. PAYER
537 Main Street
Ames, Iowa 50010

Attorneys for Petitioner

Of Counsel:

COVINGTON & BURLING
PAYER & VANDERBUR

November 1966

APPENDIX

Armstrong v. *Green,* 260 Ala. 39, 68 So.2d 834 (1953): Divorce; separation of parent and child for seven years; a 3-2 decision, with a strong dissent arguing that even a divorced parent must be proved unfit before custody may be denied him. Compare *Griggs* v. *Barnes,* 257 Ala. 21, 57 So.2d 61 (1952).

Henry v. *Janes,* 222 Ark. 89, 257 S.W.2d 285 (1963): Divorce; separation for eight years; neglect bordering on abandonment; extreme fear and dislike of child for parent, who had threatened to kill her. Compare *McLendon* v. *Pelt,* 208 Ark. 287, 185 S.W.2d 931 (1945).

Root v. *Allen,* 151 Colo. 311, 377 P.2d 117 (1962): Divorce; parent acquiesced in the custody of others for twelve years and thus abandoned "obligations as father." Compare *Turner* v. *Hunter,* 142 Colo. 129, 350 P.2d 202 (1960).

Baram v. *Schwartz,* 151 Conn. 315, 197 A.2d 334 (1964): Divorce; ten-year separation. (See Pet. p. 27 n. 15).

Bailey v. *Mars,* 183 Conn. 593, 87 A.2d 388 (1952): Illegitimate child; mother gave her consent to adoption and the child was adopted. The question was whether under the state adoption statute that consent could be revoked so as to terminate the jurisdiction of the probate court. The merits of the custody issue were not reached.

Hitchcock v. *Thomason,* 148 A.2d 458 (D.C. Mun. App.), *rev'd in part on other issue sub nom. Thomason* v. *Thomason,* 274 F.2d 89 (D.C. Cir. 1959): Divorce; express fiinding of parental unfitness. Compare *Bell* v. *Leonard,* 251 F.2d 890 (D.C. Cir. 1958); *In re Stuart,* 114 F.2d 825 (D.C. Cir. 1940), decisions of the highest court of the District of Columbia.

Fielding v. *Highsmith,* 152 Fla. 837, 13 So.2d 208 (1943): Seven-year separation; "neglect" by the parent; strong preference expressed by child, who was thirteen years old. Compare *Meyers* v. *Shefrin,* 146 So.2d 770 (Fla. App. 1962).

Altmiller v. *Forsman,* 76 Idaho 521, 285 P.2d 1064 (1955): Divorce; seven-year separation; court said that a parent may be denied custody only if unfit or "unable to provide proper training and education." Compare *Schiller* v. *Douglas,* 48 Idaho 803, 285 Pac. 1021 (1930).

Giacopelli v. *Florence Crittenton Home,* 116 Ill.2d 556, 158 N.E.2d 613 (1959): Mother had expressly renounced and abandoned the child to defendant home; father had been divorced several times and had a long criminal record; his "past conduct and character . . . fails to inspire any degree of confidence." Three judges advocated express recognition of the fitness rule and declared that this was what the court was really applying. (See Pet. p. 27 n.14).

Hamilton v. *Sourjohn,* 332 Ill. App. 279, 75 N.E.2d 42 (1947): Divorce; acquiescence by parent in the custody of others for ten years.

Scott v. *Ashcraft,* 342 Ill. App. 33, 95 N.E.2d 122 (1950): In this case the parent prevailed, even though the children had lived with others for twelve years. The court expressly stated and applied the rule that the right of a parent is absolute in the absence of unfitness or abandonment.

People ex rel. Bobroff v. *Levin,* 350 Ill. App. 501, 113 N.E.2d 177 (1953): In this case the surviving parent, though previously divorced, prevailed.

Beach v. *Leroy,* 228 Ind. 122, 89 N.E.2d 912 (1950): Voluntary relinquishment of care and custody by the parent for six years.

Brown v. *Beachler,* 224 Ind. 477, 68 N.E.2d 915 (1946): Divorce; four-year separation; the child was "starved" and physically deformed because of maltreatment when the contesting parent last had custody.

Glass v. *Bailey,* 233 Ind. 266, 118 N.E.2d 800 (1954): Voluntary relinquishment for seven years. With this and the two Indiana cases immediately above, compare *Kirkum* v. *Kasprzak,* 242 Ind. 198, 177 N.E.2d 459 (1961).

State ex rel. Paul v. *Peniston,* 235 La. 579, 105 So.2d 228 (1958): Nine-year relinquishment; a concurring opinion interpreted the court's holding as based on abandonment. See *Brown* v. *Ellison,* 162 So.2d 805 (La. App. 1964).

Thumma v. *Hartsook,* 239 Md. 38, 210 A.2d 151 (1965): Parents were "completely unstable" and had voluntarily placed the child with a friend; the court's custody order in favor of the friend was temporary only; there was no final adjudication of the right to custody.

Trenton v. *Christ,* 216 Md. 418, 140 A.2d 660 (1958): Divorce; separation for eight years. With this and the preceding case, compare *McClary* v. *Follett,* 226 Md. 436, 174 A.2d 66 (1961).

In re Adoption of a Minor, 343 Mass. 292, 178 N.E.2d 264 (1961): Illegitimate child; neglect, voluntary relinquishment and separation for six and a half years.

Forbes v. *Warren,* 184 Miss. 526, 186 So. 325 (1939): Separation for 14 years, the entire life of the child, who was "passionately opposed" to going to live with her natural parents. In spite of these facts, there was a strong dissent based on the parental rights doctrine.

Testerman v. *Frederich,* 323 S.W.2d 522 (Mo. App. 1959): Divorce; six-year separation; grave doubt as to parent's mental stability; the two older children, ages 17 and 12, testified they were afraid of him.

In re J ————————, 357 S.W.2d 197 (Mo. App. 1962): Divorce; voluntary relinquishment and separation for four years.

Wall v. *Hardee,* 240 N.C. 465, 82 S.E.2d 370 (1954): Illegitimate child; six-year separation. The case was decided on procedural grounds, and there was no final adjudication as to custody.

McKay v. *Mitzel,* 137 N.W.2d 792 (N.D. 1965): Divorce; separation for eight years; children aged 10 to 15 strongly wished to stay where they were. (See Pet. p. 27 n.15).

Osburn v. *Roberts,* 197 Okla. 206, 169 P.2d 293 (1946): Acquiescence in custody of another for three years, the entire life of the child. (See Pet. p. 27 n.15).

Russell v. *Russell,* 208 Okla. 41, 253 P.2d 136 (1953): Divorce; voluntary relinquishment for ten years.

Taylor v. *Taylor,* 182 Okla. 11, 75 P.2d 1132 (1938): Voluntary permanent relinquishment with a promise not to reclaim; separation for six and a half years, the entire life of the child.

Long v. *McInnich,* 264 P.2d 767 (Okla. 1953): Divorce; separation for eight years, the entire life of the child; evidence as to "general unfitness" and "general misconduct" of the parent. With this and the three preceding cases, compare *Gibson* v. *Dorris,* 386 P.2d 186 (Okla. 1963).

Commonwealth ex rel. Gall v. *Reed,* 202 Pa. Super. 558, 198 A.2d 344 (1964): Divorce; separation for ten years; children "detested and feared" their father; strong evidence of homosexual attacks by father on sons.

Commonwealth ex rel. Ruczynski v. *Powers,* 206 Pa. Super. 415, 212 A.2d 922 (1965): Illegitimate child; contending parent had agreed to adoption. The court stated the issue as whether she was a fit parent and found that she was not. The decision was affirmed by the Pennsylvania Supreme Court, which agreed, 421 Pa. 2, 219 A.2d 460 (1966).

Commonwealth ex rel. Shamenek v. *Allen,* 179 Pa. Super. 169, 116 A.2d 336 (1955): Separation for three years; past misconduct of father resulting in pronounced antipathy of 10-year-old child to him. (See Pet. p. 27 n.15; with the three cited Pennsylvania cases, compare *Commonwealth ex rel. Insalaco* v. *Delconte,* 413 Pa. 221, 196 A.2d 353 [1964], *affirming* 201 Pa. Super. 354, 192 A.2d 750 [1963]).

Smith v. *Smith,* 188 Tenn. 430, 220 S.W.2d 627 (1949): Divorce; case decided on procedural grounds with no adjudication of custody.

King v. *Shrum*, 244 S.W.2d 720 (Tex. Civ. App. 1951): Divorce; five-year separation. (See Pet. p. 27 n.15).

Truttar v. *Pullen*, 311 S.W.2d 723 (Tex. Civ. App. 1958): Divorce; eight-year separation. Case decided on statutory and procedural grounds with no adjudication as to custody.

Stout v. *Massie*, 140 W. Va. 731, 88 S.E.2d 51 (1955): Illegitimate child; adoption already in effect; reflections on moral character of contending parent. Nevertheless there was a strong dissent based on parental rights. Compare *Whiteman* v. *Robinson*, 145 W. Va. 685, 116 S.E.2d 691 (1960).

Morris v. *Jackson*, 66 Wyo. 369, 212 P.2d 78 (1949): Divorce; four-year separation; implied unfitness of parent, who was "hardly . . . of an exemplary character."